

No. 87-5765-CSY
Status: GRANTED
CAPITAL CASE

Title: Kevin N. Stanford, Petitioner
v.
Kentucky

Docketed:
November 2, 1987

Court: Supreme Court of Kentucky

Counsel for petitioner: Heft, Frank W.

Counsel for respondent: Smith, David A.

Stay in lower court

Entry	Date	Note	Proceedings and Orders
1	Nov 2 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Nov 23 1987		Order extending time to file response to petition until January 2, 1988.
5	Jan 2 1988		Brief of respondent Kentucky in opposition filed.
6	Jan 7 1988		DISTRIBUTED. January 22, 1988
8	Jun 24 1988		REDISTRIBUTED. June 29, 1988
9	Aug 1 1988		Supplemental brief of petitioner Kevin N. Stanford filed.
13	Aug 29 1988		Brief of respondent Kentucky in opposition to Supplemental brief of petitioner filed.
11	Oct 11 1988		Petition GRANTED.
12	Oct 17 1988		***** The order of October 11, 1988, granting the petition for a writ of certiorari is amended as follows: The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question VIII presented by the petition. The case is set for oral argument in tandem with No. 87-6026, Wilkins v. Missouri, in place of No. 87-5666, High v. Zant.
26	Oct 18 1988		Pursuant to the consent of counsel and the Clerk of the Court the following Amicus Curiae Briefs filed in 87-5666 shall be considered as filed in this case: The American Bar Association; The National Legal Aid and Defender Assoc., et al.; Amnesty International; The American Society for Adolescent Psychiatry, et al.; International Human Rights Law Group; Defense for Children International-USA; The Child Welfare League of America, et al.; The American Baptist Churches, et al.; and The West Virginia Council of Churches.
15	Nov 9 1988		Order extending time to file brief of petitioner on the merits until December 9, 1988.
16	Nov 16 1988		Record filed.
17	Nov 18 1988	*	certified original record, 43 vol. recd
18	Nov 18 1988		Brief amicus curiae of Office of Capital Collateral Representative of FL filed.
18	Nov 18 1988		Joint appendix filed.
23	Dec 19 1988		Brief of petitioner Kevin N. Stanford filed.
19	Dec 20 1988	D	Application (A88-496) to file a in excess of page limits, submitted to Justice Scalia.
20	Dec 21 1988		Application (A88-496) denied by Justice Scalia.

No. 87-5765-CSY

Entry	Date	Note	Proceedings and Orders
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22	Jan 6 1989		Order extending time to file response to petition until January 25, 1989.
24	Jan 25 1989		Brief of respondent Kentucky filed.
25	Feb 3 1989		SET FOR ARGUMENT MONDAY, MARCH 27, 1989. (4TH CASE)
27	Feb 15 1989	X	Reply brief of petitioner Kevin N. Stanford (TBP) filed.
28	Feb 15 1989		CIRCULATED.
29	Feb 28 1989	X	Reply brief of petitioner Kevin N. Stanford filed.
30	Mar 27 1989		ARGUED.

EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term, 1987

KEVIN N. STANFORD,
Petitioner,
V.
COMMONWEALTH OF KENTUCKY,
Respondent.

87-5765

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the petitioner, Kevin N. Stanford, by counsel, and respectfully requests leave to file the accompanying Petition for a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner states that he has proceeded as a pauper without the payment of fees or costs through the proceedings in the state appellate court below. The petitioner was found by the Kentucky state courts to qualify as an indigent and counsel was appointed to represent him at trial in Jefferson Circuit Court, Louisville, Kentucky and on direct appeal to the Kentucky Supreme Court. Counsel from the Office of the Jefferson District Public Defender was appointed by the Jefferson Circuit Court to represent the petitioner at trial and on appeal. An affidavit of indigency is attached.

The petitioner is, therefore, entitled to proceed herein without payment of fees, costs or giving of security therefor.

CERTIFICATE

I hereby certify that a copy of this motion was served by depositing the same in a United States mailbox, with first class postage prepaid, to Mr. David A. Smith, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601 on October 30, 1987.

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

NOV 2 - 1987

Office of the Clerk
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term, 1987

KEVIN N. STANFORD,)
Petitioner,)
V.)
COMMONWEALTH OF KENTUCKY,)
Respondent.)

87-576!

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, Kevin N. Stanford, being first duly sworn, depose and say that I am the petitioner in the above-styled case; that in support of my motion to proceed an appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; I believe that I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this proceeding are true.

1. Are you presently employed?

NO

a. If the answer is yes, state the amount of your salary or wages per month, the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Never been employed

2. Have you received within the past twelve (12) months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends or other sources?

NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve (12) months.

3. Do you own any cash or checking or savings account?

NO

a. If the answer is yes, state the total of the items owned.

4. Do you own any real estate, stocks, bonds, notes automobiles, or any other valuable property (excluding ordinary household furnishings or clothing)?

NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

KEVIN N. STANFORD
KEVIN N. STANFORD

COMMONWEALTH OF KENTUCKY
COUNTY OF LYON

SUBSCRIBED AND SWORN to before me by Kevin N. Stanford on
October 12, 1987.

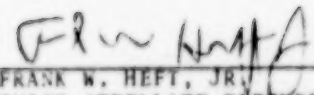
My commission expires: November 17, 1990.

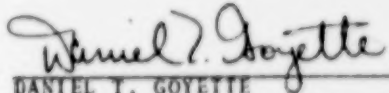
Robert H. Little
NOTARY PUBLIC, STATE AT LARGE, KY.

IN THE
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KEVIN N. STANFORD,
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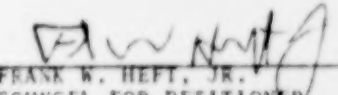
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY


FRANK W. HEFT, JR.,
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER


DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I hereby certify that a copy of this Petition was served by depositing same in a United States Postal Service Mailbox, with first-class postage prepaid and addressed to Mr. David A. Smith, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on October 30, 1987.


FRANK W. HEFT, JR.,
COUNSEL FOR PETITIONER

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Kevin N. Stanford, prays that a Writ of Certiorari be issued to review the decision rendered by the Supreme Court of Kentucky herein.

QUESTIONS PRESENTED

I. ARE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS VIOLATED WHEN A STATE APPELLATE COURT, IN A CAPITAL CASE, ADOPTS A NEW RULE OF ERROR PRESERVATION THAT ADVANCES NO LEGITIMATE STATE INTEREST, CONSTITUTES A SUBSTANTIAL DEPARTURE FROM PREVIOUSLY WELL-ESTABLISHED RULES GOVERNING PRESERVATION OF ERROR, AND PRECLUDES DEFENSE COUNSEL, DURING THE VOIR DIRE EXAMINATION FROM DETERMINING WHETHER ANY JURORS WOULD AUTOMATICALLY IMPOSE THE DEATH PENALTY REGARDLESS OF THE CIRCUMSTANCES OF THE CASE?

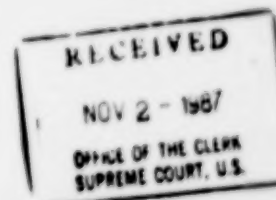
DOES APPLICATION OF THIS NEW RULE OF ERROR PRESERVATION TO THE PETITIONER'S CASE VIOLATE DUE PROCESS OF LAW?

II. DO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS REQUIRE THAT A DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING THE DEATH PENALTY BE GIVEN A SEPARATE TRIAL FROM A CO-DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING A MAXIMUM SENTENCE OF LIFE IMPRISONMENT?

III. ARE THE EIGHTH AND FOURTEENTH AMENDMENTS VIOLATED BY EXCLUDING, DURING THE PENALTY PHASE OF A CAPITAL CASE, MITIGATING EVIDENCE PRESENTED BY A FORMER DEATH ROW INMATE WHO WORKED AS A JUVENILE COUNSELOR AND OFFERED TESTIMONY NOT ONLY ABOUT HIS PERSONAL EXPERIENCE WITH THE PETITIONER PRIOR AND SUBSEQUENT TO THE ALLEGED CRIMES BUT ALSO OFFERED TESTIMONY ABOUT THE REHABILITATIVE PROGRESS AVAILABLE WITHIN THE ADULT PENAL SYSTEM?

IV. DO THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A JURY BE INSTRUCTED IN THE PENALTY PHASE OF A CAPITAL CASE THAT THE ACCUSED IS NOT REQUIRED TO TESTIFY AND THAT NO ADVERSE INFERENCE CAN BE DRAWN FROM HIS SILENCE?

V. DO THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE JURY BE INSTRUCTED DURING THE PENALTY PHASE OF A CAPITAL CASE THAT THE DEATH SENTENCE NEED NOT BE IMPOSED EVEN IF AN AGGRAVATING CIRCUMSTANCE IS PROVED BEYOND A REASONABLE DOUBT?



- vi. WHEN THE ACCUSED'S INCRIMINATING STATEMENT IS SUPPRESSED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE RULE ENUNCIATED IN EDWARDS V. ARIZONA, 451 U.S. 477 (1981) AND/OR THE SIXTH AMENDMENT RIGHT TO COUNSEL, DO THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS REQUIRE THAT THE DIRECT AND INDIRECT FRUITS OF THAT STATEMENT BE SUPPRESSED AS EVIDENCE?
- vii. ARE THE SIXTH AND FOURTEENTH AMENDMENTS VIOLATED IN A JOINT TRIAL BY THE ADMISSION OF THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT WHICH MAKES REFERENCE TO THE PETITIONER AS "THE OTHER PERSON" AND THE JURY IS NOT ADMONISHED THAT THE STATEMENT CANNOT BE USED AS EVIDENCE OF THE PETITIONER'S GUILT?
- viii. DOES THE IMPOSITION OF THE DEATH PENALTY ON A JUVENILE CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

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OPINIONS BELOW

Following a jury trial, the petitioner, Kevin N. Stanford, was convicted of murder [Ky. Rev. Stat. (KRS) 507.020], first degree robbery (KRS 515.020), first degree sodomy (KRS 510.070) and receiving stolen property over \$100.00 (KRS 514.110). By a final judgment entered on September 28, 1982, the petitioner was sentenced to death on the murder conviction, 20 years on the robbery and sodomy convictions and 5 years on the receiving stolen property charge. The terms of imprisonment were ordered to run consecutively (Transcript of Record (TR) No. 82CR0406 at pp. 401-404; Appendix to Certiorari Petition (App.) at pp. 36-39).

On April 30, 1987, the petitioner's convictions and death sentence were affirmed by the Kentucky Supreme Court, Stanford v. Commonwealth, Ky., 734 S.W.2d 781 (1987). (App. 10-35).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The Kentucky Supreme Court affirmed the petitioner's conviction and death sentence on April 30, 1987 (App. 10-35). On June 3, 1987, the petitioner tendered to the Kentucky Supreme Court a 45 page petition for rehearing and a motion for leave to file a petition in excess of the 10 page limit enunciated in Kentucky Rule of Civil Procedure (CR) 76.32(3)(d) (App. 9). On June 29, 1987, the motion was denied and the petitioner was ordered to file a petition for rehearing with a maximum of 10 pages by July 10, 1987 (App. 8). On that date the petitioner filed a 10 page petition for rehearing (App. 7) and a motion to reconsider the order of June 29, 1987 (App. 6).

On September 3, 1987, the Kentucky Supreme Court denied the petition for rehearing and the motion to reconsider (App. 5). This petition is timely filed within 60 days of the denial of the petition for rehearing. Sup. Ct. R. 20.4.

On September 4, 1987, the Kentucky Supreme Court granted the petitioner a stay of execution of his death sentence to and including December 3, 1987. (App. 2).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are the Fourth, Fifth, Sixth and Eighth Amendments and Section One of the Fourteenth Amendment. They are reproduced in the Appendix at p. 1).

STATEMENT OF THE CASE¹

A. Material Facts.

In the early morning hours of January 8, 1981, Jefferson County, Kentucky, police officers found the body of a service station attendant, Baerbel Poore, in the backseat of her car. She had sustained a non-fatal gunshot wound to the left side of the face and a fatal gunshot wound to the right side of the head near the ear. (TE III, 364, 400-401). Two gallons of gasoline, a two gallon gasoline container, \$143.07 in cash and 300 cartons of cigarettes were taken from the service station where she worked. (TE VII, 942, 944-946).

The police learned that cigarettes which may have been taken from the service station were being sold by Owen Smyzer and Alexis Sloan. (TE III, 407; TE IV, 456-457). Sloan said he saw the petitioner and the co-defendant, David Buchanan, together about 9:00 p.m. on January 7, 1981.² About 11:30 p.m., Sloan said he saw the petitioner with two boxes of cigarettes which he wanted Sloan to hold for him. (TE VII, 1003-1008). Sloan said that the petitioner told him on January 8 that he stole the cigarettes from the service station and that a friend of his killed the woman at the service station. (TE VII, 1010-1023).

On January 13, 1981, the petitioner was questioned by police about the cigarettes. He denied any knowledge about them and was released after questioning. (TE III, 408-409; TE IV, 516-518). The petitioner was arrested later that evening, on information developed

1. References to the Trial Transcript of Evidence are made TE, Volume and Page. Reference to transcripts from other hearings are made TE, Date, Volume and Page.

2. This Court recently heard and decided the case of the co-defendant. See Buchanan v. Kentucky, ____ U.S. ____, 107 S.Ct. 2906 (1987).

from Owen Smyzer, on a charge of receiving stolen property. During the search of the petitioner's apartment on January 14, 1981, the keys belonging to a service station were found. (TE III, 473-478, 495).

Information was also developed from the petitioner that Calvin Buchanan, who was David Buchanan's uncle, may have been involved in the crime. An arrest warrant was issued for Calvin and his house was searched, pursuant to a warrant, on January 14, 1981. No evidence was recovered in the search. (TE III, 410-411; TE IV, 472-473, 523).

On January 16, 1981, while incarcerated in jail on this crime, Calvin agreed to allow the police to tape record a telephone conversation between him and David Buchanan. The police then brought David to headquarters for questioning about the crimes. (TE III, 411-412; TE IV, 478-479, 532-533).

David Buchanan gave the police an oral statement implicating himself, the petitioner and Troy Johnson in the crimes. (TE III, 417-420; TE IV, 481-486; App. 44-49). Johnson was arrested and a two gallon gasoline can which was identified as the one taken from the service station was recovered in a field adjacent to Johnson's brother's residence. (TE III, 420-421; TE IV, 487-490).

The petitioner, David Buchanan, and Troy Johnson were juveniles and proceedings against them were commenced in juvenile court. Johnson pleaded guilty in juvenile court to his involvement in the crimes and was sent to a juvenile camp. (TE VII, 1029, 1048). The juvenile court waived its jurisdiction over the petitioner and Buchanan and they were jointly tried as adults in Jefferson Circuit Court. (TR 81CR1218, 18-21, 28-31; App. 40-42). Buchanan did not testify at trial although his statement was admitted into evidence over the objection of the petitioner. (TE IV, 482; App. 45). Johnson testified at trial that David Buchanan asked him to get him a gun to commit a robbery on January 7, 1981. Johnson supplied Buchanan with a gun and some ammunition and, according to Johnson, Buchanan then called the petitioner. Johnson, accompanied by Buchanan, drove to the petitioner's apartment. Johnson said he waited in his car while the petitioner and the co-defendant went into the service station. (TE VII, 1030-1084). Sometime later, Buchanan returned to the car and

told Johnson that he had had sex with the service station attendant. Buchanan told Johnson to follow a car that was being driven away from the service station. When the car stopped, Johnson stopped his car behind it. Johnson accused the petitioner of doing the shooting. (TE VII, 1035-1038, 1044).

Kerise Ison and Amona Dorsey testified that they drove upon the crime scene just as the shots were being fired. Both women said they saw two men walking away from a car which was subsequently identified as the victim's car. The men walked past Ms. Dorsey's car and got into a third vehicle. The women then drove away from the area. At a line-up, both women identified Calvin Buchanan as one of the men they saw. Neither woman identified the petitioner as one of the men they saw that night. (TE IV, 534-536; TE VII, 954-992; TE 3-9-82, Vol. II, 167-169, 182).

As noted in Argument II, there was scientific and physical evidence refuting Johnson's allegation that the petitioner was the individual who did the actual shooting. Moreover, there was no physical or scientific evidence which directly connected the petitioner to the murder and sex offenses. Similarly, the oral statements allegedly made by the petitioner to jail guards were not corroborated by any evidence other than the self-serving testimony of Johnson. (TE VIII, 1063, 1076-1082). Further facts will be developed as necessary to support the petitioner's reasons for granting review.

B. Raising the Federal Constitutional Issues.³

Question I - In a pre-trial hearing, the judge indicated that he would ask only one question to determine the jurors' qualifications to participate in a capital case. (TE 3-1-82, 10-11; App. 70-71). The judge also stated (TE 3-1-82, 22-23; App. 75-76):

3. In conformance with Kentucky practice in death penalty cases, the Kentucky Supreme Court in its opinion stated that "all prejudicial errors 'must be considered, whether or not an objection was made in the trial court.' Therefore, this opinion . . . will not disregard a claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic." Stanford v. Commonwealth, 734 S.W.2d at 783. (App. 10). See also Ice v. Commonwealth, Ky., 667 S.W.2d 671, 672 (1984); KRS 532.075(2); "The Supreme Court shall consider the punishment [in capital cases] as well as errors enunciated by way of appeal."

THE COURT: The first thing we would do is to tell them that this is a case where the Commonwealth is seeking the death penalty without telling them anything else about the case at all, and individually voir dire them about whether any of them are ultimately opposed to the death penalty.

DEFENSE COUNSEL: So then, we would have a death-qualified jury when we begin the rest?

THE COURT: That's right.

No rehabilitation of jurors on death penalty questions would be permitted (TE 3-1-82, 17-18, 31; App. 73-74, 77).

On the day of trial, the court ruled that the only question it would ask concerning the jurors' qualifications to participate in a capital case was the following (TE I, 38; App. 84):

Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstances in this or in any other case and regardless of what the evidence may be?⁴

Defense counsel tendered written questions which he wanted the court to ask prospective jurors on the question of capital punishment (TE I, 39; App. 85; TR 82CR0406, 210-215; App. 78-83). The trial court overruled the tendered questions (TE I, 39-44; App. 85-90) and counsel objected to the ruling that no rehabilitation would be permitted when the jurors were asked the aforementioned question (TE 3-1-82, 17-18, 31; TE I, 63; App. 73-74, 77, 91). The court also stated, "I intend to make it my ruling that I am going to ask all of the individual voir dire questions of the Jury." (TE I, 38; App. 84). Subsequently, defense counsel stated "we have tendered proposed questions to the capital phase which I take it are overruled?" The court responded, "Yeah." (TE I, 39; App. 85).

On direct appeal, the petitioner argued that the undue restriction on voir dire examination violated the 6th, 8th and 14th Amendments. (Appellant's Brief, Argument III, pp. 24-41). The Kentucky Supreme Court rejected the petitioner's argument on the basis that it did not view the trial court's ruling as precluding defense counsel from asking the tendered questions concerning the death

4. The court essentially adhered to that form of the question during the portion of the voir dire examination dealing with the jurors' qualifications to serve on a capital case although the words "conscientious scruples" were used in lieu of "personal conviction" (TE I, 65-148; TE II, 151-207).

penalty during the general questioning phase of the voir dire examination. Stanford v. Commonwealth, 734 S.W.2d at 785-786; App. 16-17. In his petition for rehearing, the petitioner argued that the Kentucky Supreme Court, in effect, created an exception to its own rule that attorneys must comply with orders and rulings of the court. See Leibson v. Taylor, Ky., 721 S.W.2d 690, 692 (1986). The petitioner argued that, under traditional rules governing Kentucky procedure on preservation of error, when the trial court indicated it was not going to let defense counsel ask the tendered questions during the individual voir dire examination on the issue of the death penalty, counsel was required to accede to the ruling and not attempt to ask those questions in another phase of the proceedings. Citing Henry v. Mississippi, 379 U.S. 443 (1965), the petitioner argued that the Kentucky Supreme Court created a new rule of error preservation which did not serve any legitimate state interest and contravened well-established principles governing preservation of error in Kentucky. The petitioner asserted that the implementation of this new rule of procedure violated his 6th, 8th and 14th Amendment rights. (Petitioner's Petition for Rehearing, filed 7-10-87, pp. 1-4).

Question II - A pre-trial motion was filed requesting that the petitioner be given a separate trial from that of the co-defendant, David Buchanan. (TR 81CR1218, 198-200; App. 50-52). The petitioner argued that he would be unable to cross-examine Buchanan concerning a statement he made implicating the petitioner. He also argued that the rule of Bruton v. United States, 391 U.S. 123 (1968) would not adequately protect his rights. The motion was overruled. (TE Hrng. 3-1-82, 184-186; App. 53-55). The motion for a separate trial was renewed following the trial court's ruling which excluded the death penalty for the co-defendant. (TR 82CR0406, 207-209; App. 56-58).⁵ The motion was again overruled. (TE I 34; App. 59). On

5. Buchanan's motion was premised on Enmund v. Florida, 458 U.S. 782 (1982). (TR 82CR0406, 164-170). However, no hearing was conducted on the motion and the trial court did not make any specific findings of fact or conclusions of law that the death penalty was an unconstitutional sentence to impose on Buchanan because he fell squarely within the parameters of Enmund. See Buchanan v. Kentucky, ____ U.S. at ____, 107 S.Ct. at 2110.

direct appeal the petitioner argued that the failure to grant him a separate trial from that of the co-defendant violated the rights guaranteed him by the 6th, 8th and 14th Amendments. (Appellant's Brief, Argument VIII, pp. 61-74).

Question III - During the penalty phase of the petitioner's capital trial, the defense offered the testimony of Robert Jones as mitigating evidence. The prosecution objected to Jones' testimony. (TE X, 1483-1486; App. 110-113). By a procedure known as an avowal, the testimony of Mr. Jones was presented to the trial court, outside the presence of the jury, for the trial court's consideration and for review by an appellate court. (TE X, 1485-1497; App. 112-124).⁶ Upon completion of the avowal, the prosecution's objection was sustained and Jones was not permitted to give any testimony in the presence of the jury. (TE X, 1498-1500; App. 125-127). On direct appeal, the petitioner argued that the exclusion of Jones' testimony violated the 8th and 14th Amendments. (Appellant's Brief, Argument XVIII, pp. 157-162).

Question IV - During the penalty phase, defense counsel tendered instructions which advised the jury that the petitioner's exercise of his right not to testify could not be used as an inference of guilt and should not prejudice him in any way. (App. 61, 66). The instructions were tendered in conformance with the Kentucky Rule of Criminal Procedure (RCr) 9.54(2).⁷ On direct appeal, the petitioner argued that the trial court's failure to give a "no adverse inference" instruction violated the 5th and 14th Amendments. (Appellant's Brief, Argument XXII, pp. 235-238).

6. The version of RCr 9.54(2) which was in effect at the time of the petitioner's trial provided that an issue with respect to the instructions could be preserved for appellate review "by an offered instruction or by motion or [by making an] objection before the court instructs the jury, stating specifically the matter to which [the party] objects and the . . . grounds of his objection." App. 1A.

7. An avowal is a procedure authorized by Kentucky Rule of Criminal Procedure (RCr) 9.52 which allows a party to place in the record evidence ruled inadmissible by the trial court. The evidence is presented outside the presence of the jury and an appellate court is thereby able to review the trial court's ruling excluding the evidence. App. 1A.

Question V - During the penalty phase, the petitioner requested that the jury be instructed "that even if you believe that the aggravating circumstances alleged have been proved beyond a reasonable doubt, you may still nevertheless in your discretion recommend a sentence other than death. A finding that the aggravating factors do exist does not mean that you must give the death penalty to Kevin N. Stanford." (App. 60-61). The petitioner also requested that the jury be instructed: "Even if you believe the aggravating circumstances exist beyond a reasonable doubt, you are not bound to return a finding of death." (App. 66). On direct appeal, the petitioner argued that the failure to give the aforementioned instructions violated the 8th and 14th Amendments. (Appellant's Brief, Argument XXVI, pp. 213-217).

Question VI - The petitioner filed a pre-trial motion to suppress his statement to police officers and to suppress all the fruits derived therefrom. (TR 81CR1218, 143-150; App. 92-99). Following a hearing on the motion, the trial court ruled that the petitioner's arrest was legal but that his statement was obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981) and the right to counsel. (TR 82CR0406, 111-115; App. 100-104). The trial court also ruled that the fruits (as categorized by defense counsel) derived from the petitioner's statement were admissible. (TR 82CR0406, 115-118; App. 104-107). On direct appeal, the petitioner argued that his arrest was illegal because it lacked probable cause and that evidence was admitted at his trial in violation of the 4th, 5th, 6th and 14th Amendments. (Appellant's Brief, Argument XVII, pp. 123-156).

Question VII - During trial, the petitioner objected to any testimony by Detective Hall about a statement made to him by David Buchanan. (TE IV, 482; App. 45). The petitioner was concerned that the jury would identify him as "the other person" even if his name was redacted from the statement. (TE IV, 482-483; App. 45-46). The objection was overruled but the court cautioned Hall not to mention the petitioner by name. (TE IV, 482-483; App. 45-46). On direct appeal, the petitioner argued that the 6th and 14th Amendments were violated by the admission of the non-testifying co-defendant's statement into evidence. (Appellant's Brief, Argument IX, pp. 74-80).

Question VIII - The petitioner filed a pre-trial motion and argued that imposition of the death penalty on the petitioner, who was 17 years old at the time of the alleged crimes, constituted cruel and unusual punishment in violation of the 8th and 14th Amendments. (TR 81CR1218, 210-212; App. 128-130). The motion was overruled. (TE 3-1-82, 80; App. 131). The motion was renewed immediately prior to trial and was again overruled. (TE I, 35; App. 132). On direct appeal, the petitioner argued that imposition of the death penalty on juveniles violated the 8th and 14th Amendments. (Appellant's Brief, Argument XXI, pp. 177-188).

I. THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN A STATE APPELLATE COURT, IN A CAPITAL CASE, ADOPTS A NEW RULE OF ERROR PRESERVATION THAT ADVANCES NO LEGITIMATE STATE INTEREST AND CONSTITUTES A SUBSTANTIAL DEPARTURE FROM PREVIOUSLY WELL-ESTABLISHED RULES GOVERNING PRESERVATION OF ERROR.

APPLICATION OF THIS NEW RULE OF ERROR PRESERVATION TO THE PETITIONER'S CASE VIOLATES DUE PROCESS OF LAW.

This Court has often considered the question of whether State laws or rules of procedure could limit or supersede the exercise of a federal constitutional right by the accused in a criminal case.⁸ This case provides the Court with an opportunity to balance State interests in proper preservation of error on the issue of voir dire examination of jurors in a capital case against the interests of accused to meaningfully exercise his right to trial by a fair and impartial jury and be safeguarded from arbitrary imposition of the death penalty that would result from the seating of jurors who were not constitutionally qualified for service in a capital case.

⁸ See for example, Chambers v. Mississippi, 410 U.S. 284 (1973); Henry v. Mississippi, 379 U.S. 443 (1965); Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 390 U.S. 415 (1968); Davis v. Wechsler, 263 U.S. 22 (1923); Douglas v. California, 372 U.S. 353 (1963); Duncan v. Louisiana, 391 U.S. 145 (1968); Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); Brooks v. Tennessee, 406 U.S. 605 (1972); California v. Green, 399 U.S. 145 (1970); Dutton v. Evans, 300 U.S. 71 (1957); James v. Kentucky, 406 U.S. 341 (1972); Carter v. Kentucky, 450 U.S. 288 (1981); Crane v. Kentucky, 476 U.S. 100 S.Ct. 2142 (1986); Evitts v. Lucey, 469 U.S. 387 (1985); Griffin v. Illinois, 351 U.S. 12 (1956); Ohio v. Roberts, 448 U.S. 56 (1980); Gerstein v. Pugh, 420 U.S. 103 (1974); Washington v. Texas, 388 U.S. 14 (1967); and Taylor v. Louisiana, 419 U.S. 579 (1975).

As noted in the Statement of the Case (pp. 4-6), the trial court asked only one question during the individual voir dire examination to determine the qualifications of the prospective jurors to participate in a capital case. (TE 3-1-82, 10-12; App. 70-72). The court indicated that the jury would be "death-qualified" at the completion of the individual voir dire examination and prior to the commencement of the general voir dire examination. (TE 3-1-82, 22-23).⁹ Defense counsel tendered a list of questions concerning capital punishment and pre-trial publicity which he wanted the court to ask. (TE I, 39; TR 82CR0406, 201-215; App. 78-83). Prior to the commencement of the voir dire examination, defense counsel stated "We have tendered proposed questions to the capital phase which I take it are overruled?" The court responded, "Yeah." (TE I, 39; App. 85).¹⁰

The Kentucky Supreme Court recognized a defendant's right to ask the questions listed in n. 10 in order to "life-qualify" the jury, i.e. determine whether the jurors would automatically impose the death penalty regardless of the circumstances of a particular case. Stanford v. Commonwealth, 734 S.W.2d at 786. (App. 17). However, the Kentucky Supreme Court did not view the trial court's ruling as preventing defense counsel from asking "life-qualifying" questions.

9. The jurors were questioned individually regarding the issues of capital punishment and pre-trial publicity. (TE 3-1-82, 19; TE I, 50-54, 59-60). The individual voir dire examination can be found at TE I, 65; TE II, 267). The general voir dire examination began at TE II, 271 and was completed at TE III, 322.

10. Included in the list of questions which defense counsel sought to ask were several questions which sought to determine if prospective jurors would automatically vote for the imposition of the death penalty if the petitioner was convicted of murder. (TR 82CR0406, 210-212 [Questions 1-4, 11 and 16]; App. 78-80). On direct appeal the petitioner maintained that he was constitutionally entitled to ask the foregoing questions because a juror who would automatically vote in favor of the death penalty regardless of the circumstances of the individual case would be unqualified for service in a capital case under the doctrine announced in Wainwright v. Witt, 469 U.S. 412 (1985). Several courts have determined that jurors who would automatically vote the death penalty regardless of the circumstances were unqualified for service in a capital case. See Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981); Pierce v. State, Tex. Cr. App., 604 S.W.2d 185 (1980); Hance v. Zant, 595 F.2d 940 (11th Cir. 1983). [Appellant's Brief, Argument III, pp. 26-30]. The importance of the issue presented by whether a juror can be struck for cause because he would automatically vote for the death penalty is reflected in the fact that this Court has granted certiorari in Ross v. Oklahoma, (No. 86-5309), ___ U.S. ___, 41 Cr. L. Rptr. 4071 (8-15-87).

Indeed, the court imposed an affirmative duty on defense counsel to ask those questions in the general voir dire examination in spite of the trial court's ruling. Id. at 876; App. 17.

This conclusion contradicts the court's ruling that it would "not disregard a claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic." Id. 734 S.W.2d at 783; App. 10. It is obvious that the Kentucky Supreme Court has not construed defense counsel's failure to ask the tendered questions as a "deliberate trial tactic". Indeed, it would be ludicrous to suggest that any competent attorney would, as a matter of trial strategy, fail to ask the tendered questions which bore directly on the jurors' qualifications to serve in a capital case. As noted above and on pp. 4-6 of the Statement of the Case, the trial judge made unmistakably clear that he had overruled defense counsel's tendered questions. (TE I, 39; App. 85). Yet, the effect of the rule enunciated by the Kentucky Supreme Court is to require trial attorneys to run the risk of contempt in order to preserve an error for appellate review. The rule announced herein constitutes a substantial departure from well-established rules of procedure governing preservation of error in Kentucky and advances no legitimate state interest.

Kentucky has never required that an attorney continually press the trial court to grant a particular motion or form of relief when the court has made a ruling on that subject matter. When the trial court overrules an objection to a question that is asked of a witness, no requirement is imposed on counsel to continue to object to the same line of questioning. Bailey v. Bailey, 297 Ky. 400, 180 S.W.2d 316, 319 (1944). See also Louisville and N.R.Co. v. Rowland's Adm'r., 215 Ky. 663, 286 S.W. 929, 930 (1926). The same rationale is equally applicable to the case at bar. Indeed, the Kentucky Supreme Court has recently reiterated counsel's duty to follow and obey the orders and rulings of the Court. Leibson v. Taylor, Ky., 690 S.W.2d 721 (1986). That is precisely what defense counsel did in this case. He asked for a ruling concerning the tendered questions on the issue of capital punishment, was advised that he was overruled on that point

and, respecting the ruling of the court, complied with it. Now, the Kentucky Supreme Court has enunciated a rule that equates adherence to a ruling of the trial court with waiver of an issue for appellate review. Imposition of the death penalty is fundamentally unfair and arbitrary when it is predicated on a forfeiture of a right to present a legal issue on appeal because a trial attorney, relying on well-established rules of procedure, adheres to a trial court's ruling and conforms his conduct accordingly.

In Henry v. Mississippi, 379 U.S. 443, 447 (1965), it was held that "a litigant's procedural default in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." The rule enunciated by the Kentucky Supreme Court herein serves absolutely no legitimate state interest and will engender inconsistent results because it offers no guidance as to whether an attorney can rely on a ruling of the trial court or whether he must repeatedly seek to do what the trial judge has forbidden in order to preserve the legal issue for appellate review. Such a rule does not promote the orderly administration of justice. Its strains credulity to conclude, as the Kentucky Supreme Court has done, that the trial court's ruling in the case at bar pertained only to the individual voir dire examination. Any reasonable attorney would interpret the trial court's ruling as an absolute ban on the ability to ask the tendered questions. Given the unequivocal nature of the trial court's ruling, defense counsel had an absolute duty to comply with it and to expect that his compliance would not result in a waiver of error on appeal. A rule that permits such an absurd result is so lacking due process and fundamental fairness that it renders imposition of the death penalty arbitrary.

This case also presents the question of whether application of the new rule of error preservation to the petitioner denied him due process of law. This is not the first time in which Kentucky litigants have not received the benefit of case precedent which was

overruled on their direct appeals.¹¹ Thus, it is obvious that lower courts need this Court's guidance on whether litigants whose direct appeals result in the overruling of prior cases, laws or rules of procedure should be given the benefit of the former law, especially where there is a "clear break" with former law. See Griffith v. Kentucky, ___ U.S. ___, 107 S.Ct. 708 (1987).

II. THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING THE DEATH PENALTY BE GIVEN A SEPARATE TRIAL FROM A CO-DEFENDANT FOR WHOM THE PROSECUTION IS SEEKING A MAXIMUM SENTENCE OF LIFE IMPRISONMENT.

The issue presented in the petitioner's case is different from that addressed in Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906 (1987) and Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Certiorari should be granted because the petitioner's case demonstrates the weakness in the "residual doubt" justification for a joint trial articulated in Buchanan and Lockhart and thus provides the Court an opportunity to eliminate another arbitrary factor that may lead to an unconstitutional imposition of the death penalty.

The jury's function was not only to decide guilt or innocence but was also to impose a penalty. With only the petitioner facing the death penalty at the outset of the trial, it is likely that jurors would assume that his culpability was significantly greater than that of the co-defendant. In effect, the petitioner's status as the person who did the actual shooting was pre-ordained. Indeed, the opening statements of the prosecution and the co-defendant left no doubt that they would seek to prove that the petitioner was the actual killer and therefore deserving of the death penalty. (TE III, 340, 344-345). The refusal to grant the petitioner a separate trial from the co-defendant constituted a substantial encroachment upon the

11. See Murphy v. Commonwealth, Ky., 652 S.W.2d 69 (1983) cert. denied Murphy v. Kentucky, 465 U.S. 1072 (1984), affirmed Murphy v. Sowders, 801 F.2d 205 (6th Cir. 1986) cert. denied Murphy v. Sowders, ___ U.S. ___, 107 S.Ct. 1593 (1987); Dale v. Commonwealth, 15 S.W.2d 227 (1986) cert. denied Dale v. Kentucky, ___ U.S. ___, 107 S.Ct. 1626 (1987); Morgan v. Commonwealth, Ky., 750 S.W.2d 937 (1987).

fact-finding function of the jury especially in light of the fact that there was no pre-trial evidentiary determination to justify the different sentences being sought for the petitioner and the co-defendant. Under these circumstances, the presumption of innocence is virtually nullified¹² and the failure to grant a separate trial becomes a denial of due process.¹³

Moreover, the instructions were merely a written confirmation of the pre-trial determination that the punishments of the petitioner and the co-defendant should be vastly different. (TR 82CR0406, 228, 250; App. 144-145). The fact that the jury was instructed that it could convict Buchanan of all lesser included homicide offenses, when there was no evidentiary basis supporting such instructions, further prejudiced the petitioner and gave substantial credence to the notion that the pre-determined distinction in the level of culpability between the petitioner and the co-defendant was approved by the court.

Although the prosecutor urged the jury in his closing argument not to convict Buchanan of intentional murder because the evidence indicated that the petitioner did the actual shooting, the jury rejected that plea and, in fact, convicted Buchanan of intentional murder. (TR 82CR0406, 269; TE IX, 1332, 1336). Thus, it is readily apparent that the factual distinction between the culpability of the petitioner and the co-defendant was not as clear-cut as the pre-trial ruling would have indicated.

Moreover, there was objective and independent evidence to establish that the petitioner was not the actual shooter as indicated by the testifying co-defendant (Troy Johnson, TE VII, 1030-1041) and the non-testifying co-defendant (David Buchanan, TE IV, 484-486; App. 47-49).

Two women drove upon the crime scene at the moment the shots were fired. Two black men walked past their car and a third man was in a nearby car. Neither of the women identified the petitioner as

12. Cf. Estelle v. Williams, 425 U.S. 501 (1976).

13. Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970); Alvarez v. Wainwright, 60 F.2d 583 (5th Cir. 1979).

being either of the men who walked past their car. (TE IX, 954-972, 983-992). The women identified David Buchanan's uncle, Calvin, as being one of the men that passed their car. (TE IV, 536; TE IX, 972, 991).

Johnson's testimony that the petitioner was supposed to have fired the shots from the driver's side of the victim's car is also refuted by the testimony of the state firearm's examiner who stated that scientific testing disclosed a positive reaction for firearms residue around the area of the dome light in the interior of the victim's car. (TE VI, 754-755, 760-761, 770-771; TE VII, 1037-1039, 1049; TE IV, 576-578, 581).

Moreover, the position of the victim's body and the location of the gunshot wounds are not consistent with the testimony that the shots were fired from the driver's side of the car. The victim was found face down in the rear seat of her car. Her head was on the driver's side of the car. (TE III, 400-401; TE IV, 576-579). She sustained a non-fatal gunshot wound to the left side of the mouth and also sustained a lethal gunshot wound to the right side of the head in the vicinity of the ear. (TE III, 366-368, 372). The position of the victim's body would indicate that the first shot fired had to have been a non-fatal wound to the left side of the face. That shot would have caused her head and body to spin to the right and back of the car and be pushed toward the driver's side of the car. Since only one gun was alleged to have been involved and one individual was alleged to have fired the shots, the position of the victim's body indicates that the fatal shot could not have been fired from the driver's side of the car where the petitioner was supposed to have been standing.

Insofar as the evidence raises a substantial question about whether the petitioner was the actual shooter, the case at bar underscores the inherent weakness in the "residual doubt" justification for a joint trial between a capital and non-capital defendant. Buchanan v. Kentucky, ___ U.S. at ___, 107 S.Ct. at 2915; Lockhart v. McCree, 476 U.S. at ___, 106 S.Ct. at 1769. Under the circumstances, it is obvious that the petitioner did not derive any "benefit" at the sentencing phase of the trial from the jury's "residual doubts" about the evidence presented at the guilt phase." Lockhart, 106 S.Ct.

at 1769. Furthermore, the joint trial caused the prosecution to reap an unwarranted benefit from the statement of the non-testifying co-defendant. It is likely that the jury would use Buchanan's statement as corroboration of Troy Johnson's trial testimony. Thus, the joint trial had the effect of attributing a measure of reliability to Buchanan's statement that was not supported by the evidence. Such an anomalous result contravenes the presumed unreliability of a non-testifying co-defendant's statement. Lee v. Illinois, 476 U.S. ___, ___, 106 S.Ct. 2056, 2061, 90 L.Ed.2d 2514 (1986). The prejudice to the petitioner is significantly enhanced because the record of the case at bar does not reflect that the trial court ever instructed the jury that Buchanan's statement could not be used as evidence against the petitioner. (See Argument VII).

Accordingly, the petitioner prays that the Court grant him a writ of certiorari to decide the question of whether there are ever any circumstances under which the 6th, 8th, and 14th Amendments require that a defendant against whom the death penalty is being sought be given a separate trial from a co-defendant for whom the maximum sentence is a term of imprisonment.

III. THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY EXCLUDING, DURING THE PENALTY PHASE OF A CAPITAL CASE, MITIGATING EVIDENCE PRESENTED BY A FORMER DEATH ROW INMATE WHO WORKED AS A JUVENILE COUNSELOR AND COULD OFFER TESTIMONY NOT ONLY ABOUT HIS PERSONAL EXPERIENCE WITH THE PETITIONER PRIOR AND SUBSEQUENT TO THE ALLEGED CRIMES BUT WHO COULD ALSO TESTIFY ABOUT THE REHABILITATIVE PROGRAMS OFFERED WITHIN THE ADULT PENAL SYSTEM.

The Kentucky Supreme Court ruled that the trial court properly excluded mitigating evidence offered by Robert Jones during the penalty phase of the petitioner's trial. Stanford v. Commonwealth, Ky., 734 S.W.2d at 788-790; App. 24-28. In reaching that conclusion, the Kentucky Supreme Court has imposed arbitrary limitations on the presentation of mitigating evidence during the penalty phase of a capital case. The case at bar reflects the need for further guidance from this Court on the issue of what, if any, restrictions can be constitutionally imposed on the introduction of mitigating evidence in a death penalty case.

Out of the presence of the jury, Jones testified that he was the supervisor for the Mayor's Summer Youth Program. He had also been assistant director of the Juvenile Crime Program at the Urban House and a counselor for the purpose of inmate grievances at the Jefferson County Jail. (TE X, 1488; App. 115). Jones also testified that he had been a death row inmate and had previously testified in a capital case as to the inappropriateness of the death penalty in that particular case. (TE X, 1489-1490; App. 116-117).

While working as a youth counselor at the Children's Detention Center in 1978 and 1979, he became familiar with the petitioner. Jones testified that he also spoke with the petitioner about a month prior to his trial. (TE X 1490-1491; App. 117-118). Jones expressed his belief that the petitioner could be rehabilitated and, based on his previous work and his most recent contact with the petitioner, believed that he could benefit from the educational and vocational opportunities offered within the adult correctional system. (TE X, 1491-1495; App. 118-122). The trial court excluded Jones' testimony in its entirety. (TE X, 1498-1500; App. 125-127).

The Kentucky Supreme Court characterized Jones' testimony as "clearly inadmissible" because "He had no academic or professional qualifications to allow him to offer opinion evidence. His personal knowledge of [the petitioner] was at best minimal and remote. That very little of his testimony which might conceivably be admissible, such as the rehabilitative prospects of the defendant, was cumulative." Stanford v. Commonwealth, 734 S.W.2d at 790; App. 27. This rationale not only imposes an arbitrary limitation on the presentation of mitigating evidence in a capital trial and is inconsistent with this Court's decisions on the subject.¹⁴ The capital punishment statutes of Georgia, Florida and Texas passed constitutional muster, in part because they did not impose any limitations on the admissibility of mitigating evidence. Lockett v. Ohio, 438 U.S. at 606-608.

¹⁴ Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821 (1987).

The Kentucky Supreme Court's ruling in the petitioner's case has carved an arbitrary exception into the constitutional principle that requires all mitigating evidence to be submitted to and considered by the sentencing body. In this case, Jones offered evidence from a very unique perspective that was not shared by any other mitigation witness. Jones, as a former death row inmate, could testify from first-hand experience about the security, rehabilitative, educational and vocational opportunities offered by the adult penal system. Jones was able to relate that testimony directly to the petitioner with whom he had contact as a youth counselor prior and subsequent to the alleged crimes.

Jones' testimony cannot be excluded simply because "he holds no academic or professional credentials." Stanford v. Commonwealth, 734 S.W.2d at 879; App. 24. If mitigating evidence could be excluded on that basis, then it could be reasoned that witnesses who lacked such "credentials", such as family members, friends and acquaintances, would not be permitted to give mitigating evidence in the penalty phase of a capital case. Such a result is patently unconstitutional in light of Lockett and its progeny. Moreover, expertise "can be acquired by acquaintance with, or observation of, the subject matter." Lee v. Butler, Ky. App., 605 S.W.2d 20, 21 (1979). "A witness may become qualified [as an expert] by practice or an acquaintance with the subject. He may possess the requisite skill by a reason of actual experience or long observation." Kentucky Power Co. v. Kilbourn, Ky., 307 S.W.2d 9, 12 (1957). Jones surely falls within the parameters of those definitions.

The Kentucky Supreme Court also justified the exclusion of Jones' testimony by characterizing his knowledge of the petitioner as "minimal and remote". Stanford v. Commonwealth, 734 S.W.2d at 790; App. 27. This Court's decisions do not suggest that these are justifiable criteria upon which to exclude mitigating evidence. Even an individual who possesses "minimal" knowledge of an accused's character or record, can undoubtedly offer relevant mitigating evidence in the penalty phase of a capital trial. A witness may testify to an unusual act of heroism or kindness by the accused and even if that individual's contact with the accused in that

one instance lasts no more than a few seconds or minutes, it may well constitute the type of evidence that a jury would take into its sentencing decision.

Similarly, remoteness is an inherently unjustifiable basis upon which to exclude mitigating evidence. If such a rule were to apply, then evidence as to the accused's upbringing and childhood would be excluded as being remote to the time when he is on trial as an adult. It is a matter of common knowledge that when an individual experiences a child ultimately shapes his life as an adult. See Eddings v. Oklahoma, 455 U.S. at 115-116.

The Kentucky Supreme Court has imposed arbitrary restrictions on the introduction of mitigating evidence in a death penalty trial and has created exceptions to the rule governing the admissibility of mitigating evidence which find no support in the decisions of this Court and, indeed, conflicts with those decisions. Therefore, the petitioner prays that this Court grant a writ of certiorari to resolve the issue of whether the Kentucky Supreme Court has articulated any constitutionally acceptable grounds for excluding mitigating evidence in a death penalty case.

IV. THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A JURY BE INSTRUCTED IN THE PENALTY PHASE OF A CAPITAL CASE THAT THE ACCUSED IS NOT REQUIRED TO TESTIFY AND THAT NO ADVERSE INFERENCE CAN BE DRAWN FROM HIS SILENCE.

The accused, in the guilt-innocence phase of a criminal trial, is constitutionally entitled to an instruction which articulates the 5th Amendment right and further instructs the jury that no adverse inference can be drawn from the exercise of that right. Carter v. Kentucky, 450 U.S. 288 (1981). This Court has not addressed the question of whether such an instruction is constitutionally required to be given in the penalty phase of a capital case.

The constitutional right to remain silent does not end with the jury finding the accused guilty in the guilt-innocence phase of the trial. See, Estelle v. Smith, 451 U.S. 454 (1981). A guilty verdict does not diminish the importance of giving a "no adverse inference" instruction during the penalty phase of a capital case.

Indeed, for purposes of such an instruction, no distinction can be drawn between the guilt-innocence and penalty phases of a trial. See, Finney v. Rothgerber, 751 F.2d 858 (6th Cir. 1985).

In People v. Ramirez, 111., 457 N.E.2d 31 (1983), it was held to be reversible error not to have instructed the jury, in the penalty phase of a capital trial, that it could draw no adverse inference from the accused's decision to exercise his constitutional right to remain silent. See also Brown v. State, Tex. Crim. App., 617 S.W.2d 234, 238 (1981); and Moss v. State, Tex. Crim. App., 632 S.W.2d 344 (1982).

The importance of a "no adverse inference" instruction in the guilt-innocence phase of a criminal trial was clearly recognized in Carter v. Kentucky, *supra*. Surely, the accused is entitled to the same constitutional safeguards in the penalty phase of his trial when the jury is being asked to decide whether he should live or die. The need for a "no adverse inference" instruction is perhaps even more compelling in the penalty phase because a juror may reasonably assume that a defendant who is requesting the jury to spare his life would testify and offer reasons in the penalty phase why the death sentence should not be imposed on him.

Accordingly, the Court should grant certiorari to resolve the important constitutional question of whether the 5th and 14th Amendments require that a "no adverse inference" instruction be given during the penalty phase of a capital case.

V. THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE JURY BE INSTRUCTED DURING THE PENALTY PHASE OF A CAPITAL CASE THAT THE DEATH SENTENCE NEED NOT BE IMPOSED EVEN IF AN AGGRAVATING CIRCUMSTANCE IS PROVED BEYOND A REASONABLE DOUBT.

This Court should grant a writ of certiorari to determine if the 8th and 14th Amendments require a specific instruction that the jury can impose a sentence of imprisonment even if the aggravating circumstances are proved beyond a reasonable doubt. (App. 60-61). The trial court's instruction did not specifically instruct on this

matter. (TR 82CR0406, 311; TE XI, 1507; App. 139).¹⁵ The instruction requested by the petitioner (App. 60-61) advances the objective of eliminating arbitrary imposition of the death penalty; ensures that the jury completely understands all of the sentencing options; and dispels the notion that the finding of an aggravating circumstance automatically requires imposition of the death penalty.

The constitutional requirement to consider mitigating evidence¹⁶ is meaningless if the jury is not clearly made aware of all the available sentencing options, including the option of not imposing the death penalty notwithstanding the existence of an aggravating circumstance. In State v. Tyner, 258 S.E.2d 559, 566 (S.C. 1979), the court held that the failure to instruct the jury that it could recommend life imprisonment even if it found the existence of one or more aggravating circumstances beyond a reasonable doubt was an "arbitrary factor" requiring reversal of the death penalty. See also State v. Goolsby, 268 S.E.2d 31, 40-41 (S.C. 1980); Zant v. Gaddis, 279 S.E.2d 219, 222 (Ga. 1981); See Fleming v. State, 240 S.E.2d 37 (Ga. 1977); State v. Woomer, 284 S.E.2d 357 (S.C. 1981); Stynchcombe v. Floyd, 252 Ga. 113, 311 S.E.2d 828 (1984). It has been held that such an instruction is constitutionally required. See Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981) cert. denied 458 U.S. 1111 (1982); Goodwin v. Balkcom, 684 F.2d 801-802 (11th Cir. 1982).

If jurors who would automatically vote to impose the death penalty regardless of the circumstances would be unqualified for jury service,¹⁷ then an instruction advising the jury that it can impose a sentence of less than death notwithstanding the existence of an

¹⁵. The jury was instructed that a prison sentence could be imposed if there were more aggravating than mitigating circumstances or if no mitigating circumstances existed. (TR 82CR0406, 311; TE XI, 1507; App. 139).

¹⁶. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 106 S.Ct. 489, 90 L.Ed.2d 1 (1986); Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987).

¹⁷. See Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981); Wainwright v. Witt, 469 U.S. 412 (1985). This precise issue is presently pending before the Court. See Ross v. Oklahoma, (No. 86-5309), ___ U.S. ___, 41 Cr. L. Rptr. 4071, cert. granted (6-15-87).

aggravating circumstance, would undeniably prevent jurors from automatically imposing the death penalty simply because an aggravating circumstance is found to exist. The instruction would have the effect of safeguarding defendants in capital cases from mandatory or automatic imposition of a death sentence. The requirement for the instruction tendered by the petitioner is therefore rooted in the constitutional principle rejecting mandatory death sentences.¹⁸

It is hardly an abstract proposition that jurors may have believed that the finding of an aggravating circumstance required imposition of the death penalty on the petitioner. Indeed, the verdict forms may have contributed to such a perception on the part of the jurors. (The verdict forms can be found at App. 142; TR 82CR0406, 314).

By providing a space in which the jury was required to write out the aggravating circumstances it found after the spaces provided for recommending sentences of imprisonment, the verdict forms, in effect, can reasonably be read as requiring the jury to sentence the petitioner to death if the aggravating circumstances were found beyond a reasonable doubt. The possibility of such arbitrariness would have been eliminated had the jury been specifically instructed that the petitioner could have been sentenced to a term of imprisonment notwithstanding the existence of the aggravating circumstances. Accordingly, a writ of certiorari should be granted.

VI. WHEN THE ACCUSED'S INCRIMINATING STATEMENT IS SUPPRESSED BECAUSE IT IS OBTAINED IN VIOLATION OF THE RULE ENUNCIATED IN EDWARDS V. ARIZONA, 451 U.S. 477 (1981) AND/OR THE SIXTH AMENDMENT RIGHT TO COUNSEL, THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE DIRECT AND INDIRECT FRUITS OF THAT STATEMENT BE SUPPRESSED AS EVIDENCE.

This case provides the Court with an opportunity to determine if the rationale underlying the exclusionary rule extends to

¹⁸. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Sumner v. Shuman*, ____ U.S. ____, 107 S.Ct. 2716 (1987).

the type of Fifth Amendment violation articulated in *Edwards v. Arizona* so as to require the suppression of the direct and indirect fruits of the illegally obtained statement of the accused. The Court has not addressed the precise question presented by this case.¹⁹

In *Michigan v. Tucker*, 417 U.S. 433, 447 (1974) it was recognized that the rationale underlying the exclusionary rule "would seem applicable to the Fifth Amendment context as well." However, not only did the salient facts in *Tucker* occur prior to the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) but the petitioner's suppressed statement in this case also led police to the seizure of physical evidence, the discovery of the actual co-defendants and a putative defendant. Since the direct and indirect fruits of unconstitutional police activity must be excluded from evidence.²⁰ The question presented enables the Court to provide guidance in determining what constitutes the indirect fruits of illegal government conduct and how to determine if they are tainted by such conduct.

In its opinion on the suppression issues, the trial court recognized four "fruits" stemming from the petitioner's statement. They included: (1) Calvin Buchanan's arrest, (2) petitioner showing the police where Calvin and David Buchanan (the co-defendant) lived, (3) reference to David Buchanan in the petitioner's statement, and (4) the name of a person identified as Troy. (TR 82CR0406, 115; App. 104). Defense counsel maintained that additional fruits existed, i.e., hair and samples of bodily fluids taken from the petitioner (TR 81CR1218, 148), the telephone conversation between David and Calvin Buchanan which implicated the petitioner, the arrest of the co-defendants, David Buchanan and Troy Johnson, the search of Troy's residence

¹⁹. Here, the trial court relied on *Edwards v. Arizona* as the basis for suppressing the petitioner's statement. (TR 82CR0406, 114-115; App. 103-104). The trial judge also seemed to rely on the right to counsel as a ground for his ruling. (TR 114; App. 103). On direct appeal, the petitioner relying on *Brewer v. Williams*, 430 U.S. 387 (1977) argued that his statement was obtained as a result of Fifth and Sixth Amendment violations. (Appellant's Brief, Argument XVII, pp. 139-141). See also *Michigan v. Jackson*, 475 U.S. ____, 106 S.Ct. 1404 (1986). Accordingly, the petitioner believes that the question presented can be fairly framed with reference to the Fifth Amendment violation identified by *Edwards v. Arizona* and a violation of the Sixth Amendment right to counsel.

²⁰. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

where a gun and gasoline can which was taken from the service station were found, David Buchanan's statement, photographs taken in the course of searching Troy's residence, the procurement of the search warrant and resulting search of the petitioner's residence, and fingerprints taken from the petitioner. (TE 3-9-82, I, 44-48, 53-56, 108-111; TE Trial IV, 488; TE Trial V, 673; TE Trial VI, 822). The police were only able to solve the crime in this case after the petitioner gave his statement. (TE 3-9-82, I, 58, 73; 3-9-82, II, 231).

The petitioner was arrested on January 13, 1981, between 7:30 p.m. and 7:40 p.m.²¹ The petitioner made an incriminating statement in which he implicated Calvin Buchanan and a person named Troy. He showed the police where Calvin and David Buchanan resided and he mentioned David Buchanan by name in his statement although it was in the context of some other crimes. Following the petitioner's arrest and his statement, the police obtained a search warrant and executed it at the petitioner's residence on January 14, 1981 where they found the keys to the service station. (TE 3-9-82, Vol. I, 28-31, 44, 74-81; Vol. II, 200-201, 231-235, 262, 268-269, 284-289,

21. The petitioner continues to maintain as he did in the trial court and on direct appeal to the Kentucky Supreme Court, that his arrest was illegal and violated the Fourth Amendment. Police officers admitted that they only had rumors that the petitioner was involved in the offenses at the service station. (TE 3-9-82 Vol. I, 16; Vol. II, 220-221). Owen Smyzer was interviewed by police in connection with the stolen cigarettes. He denied any knowledge about them. (TE 3-9-82, Vol. I, 12-13). On the same day, January 12, 1981, Alexis Sloan was also interviewed by police and he likewise denied knowing anything about the incident at the service station. (TE 3-9-82, Vol. II, 264). The petitioner was initially interviewed in connection with the stolen cigarettes and the service station offenses on January 13, 1981. He requested to talk to a lawyer and after talking to him, he was not charged and was allowed to leave police headquarters. (TE 3-9-82, Vol. I, 15-18, 91, 96-102; Vol. II, 186). After the petitioner's release, Smyzer told police that he and Sloan had disposed of the cigarettes for the petitioner. However, Smyzer never claimed to see the petitioner with the cigarettes. (TE 3-9-82, Vol. I, 19-26, 46). On January 13, 1981, Sloan also told the police that he was told by the petitioner that he got some cigarettes from the service station. (TE 3-9-82, Vol. II, 221-230; Vol. III, 302, 317-323; Vol. IV, 475). Since neither Sloan nor Smyzer had been used on previous occasions to supply the police with information (TE 3-9-82, Vol. I, 46; Vol. III, 304; Vol. IV, 483-484) and since there was no indicia of reliability or independent corroboration of Sloan and Smyzer's information, the petitioner maintained that there was insufficient facts to establish probable cause for his arrest. See *Taylor v. Alabama*, 457 U.S. 687 (1982); and *Dunaway v. New York*, 442 U.S. 200 (1979). (TR 81CR1218, 143-175; Appellant's Brief, Argument XVII, 124-135).

297-298; Vol. III, 366-371; Vol. IV, 477-480; TR 82CR0406, 115; App. 104.

The police did not have the names of Calvin or David Buchanan or anyone named Troy as suspects in the case prior to the petitioner's statement (TE 3-9-82, Vol. I, 73) which resulted in Calvin's arrest on January 14, 1981. On January 16, while Calvin was in jail, the police made a tape recording of a telephone conversation between Calvin and David Buchanan in which David implicated himself in the service station offenses. David was then arrested on January 16, 1981, and made an oral statement implicating himself, the petitioner, and Troy Johnson. On January 17, 1981, Johnson was arrested and during a search of his residence, a gun, believed to be the murder weapon, and a gas can belonging to the service station were found. Head and pubic hair and saliva and blood samples from the petitioner were also obtained by the police. (TE 3-9-82, Vol. I, 31-42, 46-55; Vol. II, 151-162, 210-211; Vol. III, 374, 380-381; Vol. IV, 492-493; TE Trial IV, 484-486, 567-568; App. 47-49).

As the foregoing facts reflect, the petitioner's statement was the key piece of evidence in solving the crime. The direct and indirect fruits (either physical evidence or live witnesses) flow from the petitioner's statement. Thus, the case at bar enables the Court to give guidance in identifying the causal connection between illegal police conduct and the fruits derived therefrom and determining the extent of the taint of such conduct.

The case at bar also provides the Court with an opportunity to discuss the application of the exclusionary rule to tangible evidence and to the testimony of witnesses. See *Parker v. Estelle*, 498 F.2d 625 (5th Cir. 1974); *Williams v. United States*, 382 F.2d 48 (5th Cir. 1967); *United States v. Leonardi*, 623 F.2d 746 (2nd Cir. 1980); *United States ex rel Hudson v. Cannon*, 529 F.2d 890 (7th Cir. 1976); *United States v. Chamberlin*, 609 F.2d 1318 (9th Cir. 1979). See also *United States v. Ceccolini*, 435 U.S. 268 (1978).

VII. THE SIXTH AND FOURTEENTH AMENDMENTS ARE VIOLATED IN A JOINT TRIAL BY THE ADMISSION OF THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT WHICH MAKES REFERENCE TO THE PETITIONER AS "THE OTHER PERSON" AND THE JURY IS NOT ADMONISHED THAT THE STATEMENT CANNOT BE USED AS EVIDENCE OF THE PETITIONER'S GUILT.

The record in the case at bar does not reflect that the jury was ever admonished that the co-defendant's statement could not be used as evidence against the petitioner. Moreover, the admission of the non-testifying co-defendant's statement had the anomalous effect of not only corroborating the trial testimony of another co-defendant, when independent evidence raised a substantial question as to the veracity of that testimony (See Argument III) but also constituted evidence of the petitioner's guilt of the sexual offense. In effect, the statement's "presumed unreliability"²² was overcome by trial testimony of another co-defendant, whose veracity was open to substantial doubt and who could offer no independent evidence of the alleged sexual offense. Certiorari should be granted because the issue presented is an important one that implicates the decisions in Bruton v. United States, 391 U.S. 123 (1968); Lee v. Illinois, 476 U.S. ___, 106 S.Ct. 2056, 90 L.Ed.2d 2514 (1986) and Cruz v. New York, ___ U.S. ___, 107 S.Ct. 1714 (1987).

The co-defendant, David Buchanan, made a statement to a police officer which was admitted into evidence over the objection of the petitioner. (TE IV, 482-483; App. 45-46). The police officer told the jury what Buchanan had told him and he specifically identified Buchanan and the other co-defendant, Troy Johnson, by name. He referred to the third individual as "the other person". (TE IV, 484-486; App. 47-49). Admission of Buchanan's statement not only violated the principles espoused in Cruz v. New York, *supra*, but also left no doubt in the mind of any juror as to the identity of "the other person" and thereby violated the rule of Marsh v. Richardson, ___ U.S. ___, 107 S.Ct. 1702, 1709 (1987).

Furthermore, the Kentucky Supreme Court applied an outcome determinative test to analyze the effect of the admissibility of

22. Lee v. Illinois, 476 U.S. at ___, 106 S.Ct. at 2061.

Buchanan's statement. That Court stated that Buchanan's statement "was cumulative and, although not insignificant, it did not have the devastating quality as other direct evidence of [the petitioner's] guilt particularly that of his own extra-judicial admissions, the testimony of Troy Johnson and the physical evidence including his pubic hairs on various parts of the victim's body, and his fingerprints on the car." Stanford v. Commonwealth, 734 S.W.2d at 767-788; App. 21. Such an approach was specifically rejected in Delaware v. Van Arsdall, 475 U.S. 673, ___ 106 S.Ct. 1431, 1436 (1986). The appropriate inquiry is whether there is any reasonable possibility that the constitutional error contributed to the conviction. Chapman v. California, 386 U.S. 18, 23 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

The impact of a non-testifying co-defendant's statement is generally so strong that "the ordinarily sound assumption that a jury will be able to follow faithfully its instructions [not to consider the statement as evidence of the defendant's guilt] could not be applied." Lee v. Illinois, 476 U.S. at ___, 106 S.Ct. at 2063. Misuse is likely where, as here, the jury is never instructed on the proper use of a non-testifying co-defendant's statement. Marsh v. Richardson, 107 S.Ct. at 1709. The evidence against the petitioner was not so strong that the admission of Buchanan's statement was harmless as the Kentucky Supreme Court concluded. As noted in Argument II, there is substantial doubt to the veracity of Troy Johnson's testimony that the petitioner did the shooting. Moreover, Buchanan's statement to the police that he and the petitioner took turns "raping and sodomizing" the victim is the only direct evidence of the sexual offenses. (TE IV, 485; App. 48). That statement, of course, does not constitute evidence of the petitioner's guilt. Bruton v. United States, 391 U.S. at 125.

The physical evidence did not support the sodomy charge. Swabs of the victim's mouth and vagina did not indicate the presence of sperm. (TE III, 363, 372). Some head and pubic hair from a black person were recovered from the buttocks area of the victim and various items of clothing. (TE VI, 804-808). However, the serologist

admitted that hair comparisons did not constitute a basis for a positive, personal identification but is only used to corroborate other evidence that connects someone to a crime scene. (TE VI, 826). Saliva and anal swabs taken from the victim indicated the presence of semen, but it was too limited in quantity for blood group (ABO) typing. (TE VI, 808-809). Another anal swab (Exhibit 26G) indicated the presence of semen but since no ABO factors were demonstrated, the serologist concluded that the semen originated from a non-secretor, i.e. a person whose blood type cannot be determined from bodily fluids. (TE VI, 791, 809) The co-defendant, the petitioner and Calvin Buchanan were found to be non-secretors. (TE VI, 817-818). Similarly, the fact that one fingerprint of the petitioner was obtained from the victim's car does not establish the sexual offenses. (TE V, 708; TE VII, 915-917). The statements allegedly made by the petitioner to Corrections Officer Nally are not independently corroborated and therefore should not be construed as evidence of guilt. (TE VIII, 1076-1082; Stanford v. Commonwealth, 734 S.W.2d at 787 n.6; App. 21).

Under all of the circumstances, there is a reasonable possibility that the jury used Buchanan's statement as evidence of the petitioner's guilt. Accordingly, certiorari should be granted to address the important question presented by this case.

VIII. THE IMPOSITION OF THE DEATH PENALTY ON A JUVENILE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue was left open by Eddings v. Oklahoma, 455 U.S. 104 (1982) and the Court has granted certiorari on this issue. See Thompson v. Oklahoma, No. 86-6169, cert. granted, ____ U.S. ____, 40 Cr.L.Rptr. 4175 (2-23-87).

The petitioner was 17 years old at the time of the commission of the crimes for which he was convicted. There is a fundamental difference in the treatment of juvenile and adult offenders. See, Application of Gault, 387 U.S. 1 (1967) and Kent v. United States, 383 U.S. 541 (1966). In response, Kentucky has enacted legislation which emphasizes the treatment and rehabilitation of

juvenile offenders. See KRS Chapter 600 and its predecessor Chapter 208. The contrast between juveniles and adults is perhaps best articulated by the recognition "that incurability is inconsistent with youth". Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968). Emphasis added. In Workman, the court found that a sentence of life without parole for a fourteen (14) year old convicted rapist constituted cruel and unusual punishment and "under all the circumstances shocks the general conscience of society today and is intolerable to fundamental fairness." Id. at 378. Notwithstanding the State's interest in punishing criminal conduct, the court rejected the notion that a juvenile whose case is transferred to a circuit court for treatment as an adult, is so beyond the hope of rehabilitation that execution, without providing the juvenile a chance for rehabilitation within the adult correctional system, is the only appropriate disposition.

The difficult legal question presented by the constitutionality of the death penalty for juveniles is reflected in the diversity of treatment they receive by the various States. Fourteen (14) states and the District of Columbia have a complete ban on capital punishment. (Death Row, U.S.A., Publication of the Legal Defense Fund (8-1-87, p. 1)). Of the thirty-six (36) states permitting capital punishment, ten (10) statutorily prohibit capital punishment for juveniles.²³ Even in states where a juvenile can be executed, court decisions have reduced the punishment to life imprisonment due to the age of the defendant. See State v. Stewart, 250 N.W.2d 849 (Neb. 1977), and State v. Maloney, 464 P.2d 793, 805 (Ariz. 1970).

Indeed, the arbitrariness of the death penalty and its status of cruel and unusual punishment is graphically reflected in the case at bar. The juvenile court in its order transferring

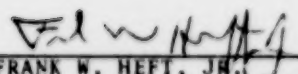
23. Cal. Penal Code §190.5 [under 18]; Colo. Rev. Stat. Ann. 16-11-103(1)(a) 1987 Supp.; Conn. Gen. Stats. Ann. §52a-46a(f)(1) [under 18]; Ill. Rev. Stats. Ch. 38, §9-1(b) [under 18]; Nev. Rev. Stat. §176.025 [under 16]; N.H. Rev. Stats. 630:1(v) [under 17]; N.M. Stats. Chap. 31, Art. 18-14 [under 18]; Ohio Rev. Code Ann. §2929.02 [under 18]; Tenn. Code Ann. §37-1-134; 39-2-203 (1)(1) [under 18]; Maryland Code Ann. Art. 27, §412.

jurisdiction to the circuit court noted that the petitioner was amenable to treatment and that he had been accepted into an appropriate treatment facility which was located outside of Kentucky. (TR 81CR1218, 30; App. 42). However, the juvenile court ruled that it lacked the "statutory basis to order the state to provide for such institutionalization for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation . . .". (TR 81CR1218, 30; App. 42). To condemn to death a juvenile, who is recognized as being amenable to treatment, without any opportunity for rehabilitation within the adult correctional system constitutes cruel and unusual punishment.²⁴

The constitutionality of the death penalty for juveniles is a substantial, legal question. The differing treatment of juveniles by the States reflects the need for this Court to resolve this important issue.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, prays that the Court grant his petition for a writ of certiorari to review the decision rendered by the Kentucky Supreme Court herein.


FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER


DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

²⁴. Given the importance of rehabilitation to the imposition of punishment, it becomes apparent that the petitioner was substantially prejudiced when the trial court excluded testimony in the penalty phase from Robert Jones, who had worked as a juvenile counselor with the petitioner prior to the crime for which he was convicted, and offered testimony not only about the rehabilitation programs offered within the adult penal system but provided testimony about how the petitioner could personally benefit from them. See Argument III.

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term, 1987

KEVIN N. STANFORD,)
Petitioner,)
V.)
COMMONWEALTH OF KENTUCKY,)
Respondent.)

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CONSTITUTIONAL PROVISIONS

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY RULES OF CRIMINAL PROCEDURE (RCr)

RULE 9.52 AVOWALS

In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

RULE 9.54 INSTRUCTIONS

(1) It shall be the duty of the court to instruct the jury in writing on the law of the case. The instructions shall be read to the jury prior to the closing summations of counsel.

(2) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he make objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

(3) The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall give an instruction to the effect that he is not compelled to testify and that the jury shall not draw any inference of guilt from his election not to testify and shall not allow it to prejudice him in any way.

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
Nos. 81-CR-1218 & 82-CR-0406

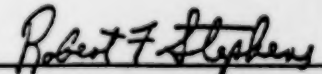
COMMONWEALTH OF KENTUCKY

APPELLEE

ORDER

On motion of the appellant, Kevin N. Stanford, a stay of execution and enforcement of this Court's opinion rendered April 30, 1987, which became final by mandate on September 3, 1987, is granted for a period of ninety (90) days to and including December 3, 1987, in order that the appellant may make application to the Supreme Court of the United States for a Writ of Certiorari. Additional stays should be obtained from the United States Supreme Court.

ENTERED September 4, 1987.



CHIEF JUSTICE

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
ACTION NOS. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY

APPELLEE

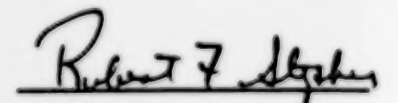
ORDER DENYING PETITION FOR REHEARING ORDER GRANTING PETITIONS FOR MODIFICATION

Appellant's petition for rehearing is denied.

The petitions of appellant and appellee for modification of the opinion are granted. The opinion is hereby modified by deleting pages 1, 2 and 8 of the original opinion and substituting new pages 1, 2 and 8 in lieu thereof.

All concur except Leibson, J., who did not sit.

ENTERED September 3, 1987. ✓



Chief Justice

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
Nos. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY

APPELLEE

ORDER REQUIRING MANDATE

Effective July 1, 1981, the Supreme Court adopted the following rule, CR 76.30(2)(f): "No mandate shall be required to effectuate the final decision of an appellate court, whether entered by order or by opinion." However, in order to satisfy the provisions of KRS 431.218, it is hereby ordered that the Clerk of the Supreme Court of Kentucky issue a mandate in this appeal in order to make effective the opinion disposing of the appeal.

ENTERED September 3, 1987.

Robert F. Stephens
CHIEF JUSTICE



Supreme Court of Kentucky

MANDATE

KEVIN N. STANFORD

File No. 83-SC-65-MR & 83-SC-66-MR Appeal From Jefferson
VS. Opinion Rendered April 30, 1987 Circuit Court Action No. 81-CR-1218 & 82-CR-0406
COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and same shall be carried into execution as provided by law on the fifth Friday following the date of the issuance of this mandate, which is ordered to be certified to the Superintendent (Warden) of the Kentucky State Penitentiary at Eddyville, Kentucky.

SEPTEMBER 3, 1987 Appellant, Kevin N. Stanford's petition for rehearing of the court's opinion rendered April 30, 1987, is denied. Appellant, Kevin N. Stanford's petition for modification of court's opinion rendered on April 30, 1987, is granted.

A Copy - Attest:

Issued September 3, 1987

Form SCC-9

BY

John C. Scott
JOHN C. SCOTT, CLERK



John C. Scott
Clerk

Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capitol Frankfort, 40601

Room 209
(502) 564-4720

RECEIPT NOTICE

TO: Frank W. Heft, Jr.

FROM: John C. Scott, Clerk, Supreme Court of Kentucky

DATE: July 10, 1987

RE: KEVIN N. STANFORD V. COMMONWEALTH
File No. 83-SC-65-MR

AND

KEVIN N. STANFORD V. COMMONWEALTH
File No. 83-SC-66-MR

The document listed below has been received and filed in
this office today in the above-styled case:*

Appellant filed MOTIONS to Reconsider
Order Entered June 29, 1987

JCS/lgf

cc: David Smith and Lloyd Vest
File

*NOTE: RESPONSE TIME TO MOTIONS BEGINS WITH THE SERVICE DATE (CR 76.34[2])
RESPONSE TIME FOR BRIEFS BEGINS WITH THE FILING DATE (CR 76.12)

Form SCC-7



John C. Scott
Clerk

Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capitol Frankfort, 40601

Room 209
(502) 564-4720

RECEIPT NOTICE

TO: Frank W. Heft, Jr.

FROM: John C. Scott, Clerk, Supreme Court of Kentucky

DATE: July 10, 1987

RE: KEVIN N. STANFORD
VS
COMMONWEALTH OF KENTUCKY

File Nos. 83-SC-65-MR and 83-SC-66-MR

The document listed below has been received and filed in
this office today in the above-styled case:*

Appellant filed Petition for Rehearing; Modification
of Opinion.

JCS/db

cc: David Smith/C. Lloyd Vest, II
File

*NOTE: RESPONSE TIME TO MOTIONS BEGINS WITH THE SERVICE DATE (CR 76.34[2])
RESPONSE TIME FOR BRIEFS BEGINS WITH THE FILING DATE (CR 76.12)

Form SCC-7

Supreme Court of Kentucky

83-SC-65-1
83-SC-66-1

KEVIN N. STANFORD

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
#81-CR-1218 & #82-CR-0406
HONORABLE CHARLES M. LEIBSON, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

ORDER

Appellant's motion for leave to supplement the record and appellant's petition for rehearing with affidavits of trial counsel is denied.

Appellant's motion for leave to file a petition for rehearing in the above-styled action in excess of ten pages is denied. Appellant is hereby granted an extension of time of ten (10) days from the date of the entry of this order in which to file a petition for rehearing in conformity with CR 76.32(3)(d).

Stephens, C.J., Gant, Lambert, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

ENTERED June 29, 1987.

Robert F. Stephens
Chief Justice



John C. Scott
Clerk

Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capitol Frankfort, 40601

Room 209
(502) 564-4720

RECEIPT NOTICE

TO: Frank W. Heft, Jr.

FROM: John C. Scott, Clerk, Supreme Court of Kentucky

DATE: June 4, 1987

RE: KEVIN N. STANFORD VS. COMTH
KEVIN N. STANFORD VS. COMTH
File nos. 83-SC-65-MR
83-SC-66-MR

The document listed below has been received and filed in this office today in the above-styled case:*

Appellant filed MOTION to supplement Record and Petition for Rehearing and Appellant filed MOTION to file Petition for Rehearing in Excess of page limitation

JCS/lgf

cc: David Smith/Lloyd Vest, A.A.G.
File

*NOTE: RESPONSE TIME TO MOTIONS BEGINS WITH THE SERVICE DATE (CR 76.34[2])
RESPONSE TIME FOR BRIEFS BEGINS WITH THE FILING DATE (CR 76.12)

TO BE PUBLISHED
RENDERED: April 30, 1987
AS MODIFIED SEPTEMBER 3, 1987

Supreme Court of Kentucky

83-SC-65-MR
83-SC-66-MR

KEVIN N. STANFORD

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
ACTION NOS. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT

AFFIRMING

Kevin Stanford appeals from his sentence of death imposed by the Jefferson Circuit Court following a jury trial in which he was found guilty of murder, first-degree sodomy, first-degree robbery, and receiving stolen property over \$100. The appellant, a 17-year-old juvenile at the time of his criminal deeds, raises numerous issues in his appeal: some are preserved, others are not. As this Court announced in *Ice v. Commonwealth*, Ky., 667 S.W.2d 671, 674 (1984), all prejudicial errors "must be considered, whether or not an objection was made in the trial court." Therefore, this opinion will concern itself only with the merits of the appellant's arguments and will not disregard claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic.

On the evening of January 7, 1981, Barbel Poore was

repeatedly raped and sodomized during and after the commission of a robbery at the Cheker gasoline station on Cane Run Road in southwestern Jefferson County where she was employed as an attendant. The proceeds of the robbery consisted of approximately 300 cartons of cigarettes, two gallons of fuel and a small amount of cash. Following the robbery Ms. Poore was taken from the station and driven a short distance to an isolated area where she was shot twice, once in the face and once, fatally, in the head.

Based upon information obtained from a juvenile reported to be selling cigarettes and from rumors at the apartment complex near the scene of the crime where appellant resided, the police arrested Stanford on January 13, 1981. Stanford gave the police a statement, subsequently suppressed, which implicated Calvin Buchanan as the major wrongdoer in the commission of these crimes. Calvin, having no desire to return to prison from where he had recently been paroled, denied any participation in the crimes and allowed the police to tape record a conversation with his nephew, David Buchanan. During that conversation, David exonerated Calvin while admitting his involvement and that of the appellant in the crimes. David Buchanan was arrested on January 16, 1981. Following his arrest he gave the police a statement in which he confessed to rape, sodomy and robbery, and implicated Stanford as the triggerman and perpetrator of the crimes. He also implicated a third juvenile, Troy Johnson, who supplied and drove the getaway vehicle and who obtained the gun used by Stanford in the murder.

In October, 1981, following a waiver hearing, the Jefferson District Court found it was in the "interest of the community and in the interest of the child that Kevin be transferred to Circuit Court and tried under the ordinary laws governing crime."

Motions for separate trials were denied and the two were tried in August, 1982. The Commonwealth originally sought the death penalty against both defendants, but prior to trial it did not object to Buchanan's motion to exclude the application of the death penalty as to him. Buchanan received a life sentence and his conviction was upheld in his appeal to this Court.¹ Other facts will be recited as necessary for an understanding of the issues raised in this appeal.

Stanford has raised several issues in regard to the jury selection process. The procedure the trial court used was the optional method of interviewing prospective jurors individually in chambers concerning the two threshold issues of pretrial publicity and ability to consider the death penalty. The court ruled it would ask only one question concerning the death penalty issue and would not allow rehabilitation by counsel of those jurors who expressed an inability to impose the death penalty. The defendants' attorneys submitted a list of nearly 30 questions which the court declined to ask. Instead, each potential juror was asked the following question by the court: "Do you have any personal conviction against imposing the death penalty, such that

¹See Buchanan v. Com., Ky., 691 S.W.2d 210 (1985), cert. granted, ___ U.S. ___, 90 L. Ed. 2d 691 (1986) (85-5348).

you could not consider it under the circumstances in this or in any other case and regardless of what the evidence might be?"

The appellant alleges that the emphasized words violated the rule articulated in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), that prospective jurors not be asked "in advance of trial whether he would in fact vote for the extreme penalty in the case before him" Id., 391 U.S. at 522, n. 21. In Ice, supra, p. 676, this court likewise held it to be error to question a juror whether he would consider imposing the death penalty in the "particular case before him."

We find no error in the form of the death-qualifying question posed to the jurors as the judge plainly asked each juror about his or her convictions "in this or in any other case," thus encompassing all such situations and not just the case to be tried. Further, the record shows that the judge was careful to explain to the veniremen that he was specifically not asking how they would decide the case at hand. While the death-qualifying question offered by the defendants, (number 24 in the list of 29)² may have been better phrased, there was nothing improper or prejudicial about the question asked by the trial court.

Stanford further complains he was denied his constitutional

²24. Are you so irrevocably opposed to the imposition of capital punishment in every possible case that you would be unwilling to consider all the penalties provided by law and would vote against the penalty of death regardless of facts and circumstances surrounding such individual cases?

right to a fair trial on the basis that the jury was not selected from a representative cross section of the community. This argument is based on the following three factors: (1) that the court commenced jury selection on the last day of service for those serving in the jury pool, thereby, arguably, creating a jury of volunteers³; (2) that on the second day of jury selection the court's procedure of interviewing prospective jurors from the pool in alphabetical order resulted in adding only those people to the pool whose last names began with the letters A-H; and (3) that the jury was death-qualified.

We find this argument to be totally without merit. There is no indication that the statute regarding jury selection, KRS 29A.060, was other than strictly complied with. That several were excused for medical, employment or other hardship reasons was a matter within the discretion of the trial court. The court, however, did not excuse all those who expressed a desire to be excused. Those interviewed were not able to "opt in or out at will," a practice denounced in United States v. Kennedy, 548 F.2d 608, 612 (5th Cir. 1977), but had to demonstrate that prolonged service would create undue problems. The procedure utilized by the trial court in the Kennedy case was that of securing jurors from lists of those whose term of duty had already expired. The Commonwealth has referred us to United

³The trial court excused twenty-one (21) of the 59 veniremen questioned on the first day of trial for various personal or business reasons proffered by those jurors.

States v. Anderson, 500 F.2d 312 (D.C. Cir. 1974), the facts of which more closely correspond to those in the instant case, which holds as follows:

In separating those who could from those who could not afford to expand their service, the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality. We think a trial judge's discretion in jury selection is broad enough to encompass consideration of adverse consequences which might be suffered by jurors suddenly called to a duty prolonged materially beyond their original expectations. Id. p. 322.

The second prong of this argument is truly spurious. The appellant cannot seriously contend that the trial court violated his right to a jury comprised of a fair cross section of the community by interviewing veniremen on the second day in alphabetical order. He has not identified any "distinctive" characteristic possessed by those whose surnames begin with the letters I-Z. See Ford v. Com., Ky., 665 S.W.2d 304, 308 (1983), citing Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579 (1979). Moreover, had the appellant proven or articulated such characteristics, there was no error as more than half of the jurors who actually heard the case had surnames beginning with these letters. It is thus evident that the group was not excluded from the jury. Finally, as pointed out in Pope v. United States, 372 F.2d 710, 725 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968), "[t]he point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn" Thus, the court's use of a facially neutral

procedure in questioning a panel of potential jurors does no harm to a defendant's due process rights.

Concerning the exclusion of those opposed to the imposition of the death penalty, such argument was rejected by this Court in Buchanan's appeal. (See footnote 1.) Further, the case of Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc) relied upon by Stanford, was overruled by the Supreme Court in Lockhart v. McCree, ___ U.S. ___, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), which held as follows:

"Witherspoon - excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement It is for this reason that we conclude that "Witherspoon - excludables" do not constitute a "distinctive group" for cross-section purposes, and hold that "death qualification" does not violate the fair cross-section requirement."

Stanford further alleges the trial court denied him his right to a trial by an impartial jury by unduly restricting the voir dire examination. We have reviewed the record in light of this claim and find no support for this allegation. That the trial court refused to allow counsel to rehabilitate potential jurors struck for cause due to their stated inability to consider the death penalty, and further, that it refused to ask each juror during the limited in camera voir dire the exhausting list of questions posed by Stanford and his codefendant, did not in any manner, directly or by implication, hamper or impede the appellant's attorney in his questioning during the general voir dire or limit the scope of such examination at that time.

Simply put, the rulings and discussions of record concerning the list of questions proposed by the defendants never addressed the propriety of asking the questions during the general voir dire.⁴ We can find no rulings on the merits of the questions nor any hint of how the court would have ruled had appellant's counsel attempted to ask the questions of the jurors during the collective voir dire. As the trial court did not make any rulings adverse to the appellant during his counsel's questioning of the jury, we can find no error prejudicial to appellant. We do not disagree with appellant that he had a right to life-qualify the jury. In this regard we agree with the Court's holding in Patterson v. Commonwealth, 283 S.E.2d 212 (Va 1981). Why, however, counsel chose not to explore "the veniremen's predilection for imposing the death penalty," id. at 215, is a question which cannot be attributed to any action or failing of the trial court.

Further, in this regard we find no error in the court's decision to strike for cause the seven jurors who indicated they would not under any circumstances impose the death penalty.

⁴It is easy to understand why the court declined to ask the questions during the individual voir dire. Not only was the list lengthy but several of the questions were so broad in nature that it could easily have taken several weeks to complete the individual voir dire. For example, question 5 asked, "How do you feel about the death penalty being a deterrent of crime"? Question 7(b) read, "What is your definition of reasonable doubt"? We note that these specific questions were not relevant to the issue at hand, that is, that of a juror's ability to be impartial, although others were more to the point.

These jurors were not excused merely because they "voiced general objections to the death penalty . . . , Witherspoon, supra, 391 U.S. at 522, or "would rather not" impose the ultimate penalty. People v. Szabo, 94 Ill. 2d 327, 447 N.E.2d 193 (1983). Instead, the seven expressed in clear words that their attitudes were such that they could not impose the death penalty regardless of the circumstances presented. There was no equivocation as appellant would lead us to believe. The court's decision to strike the seven for cause was thus appropriate under the standard articulated in Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 2326, 65 L. Ed. 2d 581, 589 (1980). In that case the Court concluded that only one whose views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" could be excluded from the jury. As explained in Wainwright v. Witt, ___ U.S. ___, 105 S. Ct. 844, ___ L. Ed. 2d ___ (1985), "[t]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of"

The appellant is correct that one may not be struck for cause merely because he would hesitate to vote for the death penalty, or has religious or philosophical qualms about imposing the penalty. Such "qualms" are to be expected. People v. Szabo, at 207. The appellant is not, however, aided by the cases cited for this proposition as, stated hereinbefore, the court did not strike any who were ambivalent. Further, the court correctly and properly inquired of those who initially expressed doubts whether or not it would be "impossible" for them to decide on the death

penalty "regardless of the evidence." Only those who affirmatively stated it would be so impossible were excused for cause. The appellant criticizes the trial court for making such inquiry, arguing that in so doing the court gave the jurors "an opportunity to escape making a difficult decision," and in effect told jurors "how to avoid serving on the case." We believe, however, that had the court failed to ascertain the extent of the jurors' views on the subject it would not have obtained the crucial information required by Adams, that is, whether their views were such as would impair their performance or duties as a juror.

That potential jurors may take probing questioning as an opportunity to sidestep their civic duty is a problem inherent in the jury selection process. That such actually occurred is a matter not likely to be evident from the record. Thus, it is incumbent upon us to trust in the impressions of the trial court. As remarked in Wainwright:

Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id., pp. 852-853.

Concerning juror Harkess, whom the court refused to strike for cause, the court was satisfied, as are we, that she could decide the case solely on the evidence presented in court and not from media accounts. The judge found she could be "open minded" and we find nothing in her responses to the court to determine otherwise. Lastly in this category, any prejudice caused by the

prosecutor's remarks concerning reasonable doubt during voir dire was cured by the court's admonition.

The most serious issue in the appeal, we believe, is the appellant's allegation that he was denied a fair trial because of the court's refusal to grant his motion for a separate trial and/or by the court's failure to exclude during the trial the confession of his nontestifying codefendant, Buchanan.⁵ This confession implicated Stanford as the triggerman in the murder and as a participant in the other crimes. The court ruled that it could "protect" Stanford by sanitizing the confession, that is, by not allowing Stanford's name to be mentioned by the witness, Detective Hall, to whom Buchanan confessed. Instead, he was consistently referred to as "some other person." As Hall related that Buchanan's expressed reason for confessing was to clear his uncle Calvin, and as Troy Johnson was referred to by name, the "other person," considering all the other evidence at trial, Stanford argues, could only have referred to him. Nevertheless, we believe the editing of his name from the

⁵Stanford additionally alleges he was entitled to a separate trial because the trial court's ruling which granted Buchanan's motion to exclude the death penalty as to him, a motion not objected to by the Commonwealth, amounted to a judicial usurpation of the jury's fact-finding role. That the Commonwealth decides to seek the death penalty against a defendant in a joint trial with a codefendant who is not death eligible does not "strip" the jury of its function in determining which defendant, if either, is ultimately responsible for the commission of the crime as charged. To accept Stanford's argument in this regard would preclude the state from ever trying defendants jointly when one is charged with a higher degree of culpability than the other.

confession was sufficient to protect his right to cross-examine inculpatory witnesses, a right provided by the Confrontation Clause of the Sixth Amendment. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

Even if the admission of Buchanan's statement did constitute an error, it is subject to "harmless-error analysis," Delaware v. Van Arsdall, 475 U.S. ___, 106 S. Ct. ___, 89 L. Ed. 2d 674, 686 (1986), see also Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), and Lee v. Illinois, 476 U.S. ___, 106 S. Ct. ___, 90 L. Ed. 2d 514 (1986), and our inquiry thus becomes whether the "error was harmless beyond a reasonable doubt." Delaware, p. 686; Lowe v. Commonwealth, Ky., 487 S.W.2d 935 (1972).

Certainly Buchanan's confession was cumulative and, although not insignificant, it did not have the devastating quality as other direct evidence of Stanford's guilt, particularly that of his own extra-judicial admissions,⁶ the testimony of Troy Johnson and the physical evidence including his pubic hairs on various parts of the victim's body, and his fingerprints on the car. Considering all this other evidence before the jury, we believe the error in this case to be harmless. As the Supreme Court remarked in Schneble v. Florida, 405 U.S. 427, 432, 92 S. Ct.

⁶Stanford told Richard Reetzhe that he would blow his brains out "just like the girl." He bragged to other juveniles while in the detention center that, "I made her suck my dick," and "we fucked her in the bootie." He explained to Michael Nally that, "I had to shoot her, the bitch lived next to me and she would recognize me."

1056, 31 L. Ed. 2d 340, 345 (1972), "Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instruction, stares us in the face."

The next group of alleged errors concerns various rulings of the trial court on evidentiary matters. First the appellant asserts that the admission of his remarks to Michael Nalley, a corrections officer at the detention center, constituted a violation of his Fifth and Sixth Amendment rights not to incriminate himself and to be represented by counsel. Nalley, who heard Stanford bragging to others in the center about his misdeeds,⁷ was asked by the appellant, in a conversation initiated by appellant, how much time he (Nalley) believed Stanford would have to serve for the crimes. After discussing how long and where he would serve, Nalley asked Stanford why he resorted to killing the victim of his sexual attacks. Nalley's testimony of Stanford's response is as follows:

[H]e said, I had to shoot her, the bitch lived next to me and she would recognize me. And then, in a laughing manner, Mr. Stanford went on and he continued, he said, I guess, we could have tied her up or something or beat the piss out of her . . . and tell her if she tells, we would kill her. . . . Then after he said that he started laughing and I just shook my head, and just continued to watch TV and didn't say anything else.

This conversation occurred several days after Stanford was placed in the detention center and advised of his rights. He insisted

⁷See footnote 6, supra.

Nalley should have re-advised him of these rights, particularly his right not to be interrogated without counsel and that his failure to so warn required the suppression of Nalley's testimony. We do not agree.

In Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), relied upon by the trial court, the Supreme Court held that one who had asserted his right to be represented by counsel could not be interrogated further "unless the accused himself initiates further communication, exchanges or conversations with the police." There is no question, by asking the officer's opinion about the sentence he would receive, that Stanford "initiated" further conversation. See Oregon v. Bradshaw, 462 U.S. 1039, 1045, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983). Considering the totality of the circumstances including the fact that he initiated the conversation, the question is whether the appellant validly waived his right to silence and to have counsel present. Id., 462 U.S. at 1046. This question was answered adversely to the appellant by the trial court following the suppression hearing and the record supports its finding that the statement was voluntarily made. Stanford knew exactly who Nalley was. There was no evidence that he had any reason to believe his remarks to Nalley would be treated confidentially. Nalley certainly did nothing to keep Stanford from exercising his constitutional rights.

There is simply no merit to any of the other issues concerning the admission of evidence and we will not belabor this opinion by discussing each one individually. The findings of the

trial court contained in its opinion and order in regard to the appellant's motion to suppress are supported by the record and its legal determinations are sound.

Stanford alleges that the trial court committed substantial error in violation of the Eighth and Fourteenth Amendments and Sections 11 and 17 of our Kentucky Constitution by excluding mitigating evidence offered by the defense during the penalty phase of the trial. This assignment of error warrants more than passing comments by us.

During the penalty phase of the trial, Robert Jones, a former death row survivor, was called as a defense witness. Jones, at the time, was a supervisor for the (Louisville) Mayor's Summer Youth Program. He had experience with various programs dealing with youths on a counseling basis although he holds no academic or professional credentials. He was also vice-chairman of the Kentucky Coalition Against the Death Penalty. In that capacity he testified that he traveled about speaking to groups and conducting seminars against the death penalty. He claimed to be demonstrative evidence that one can be rehabilitated.

The trial court excluded his testimony before the jury. Jones' opinion, preserved by an avowal of why Kevin Stanford should not be executed is, partially, as follows:

Q And, sir, could you tell me your unique relationship with the death penalty?

A Well, at one time, I was on death row myself.

Jones related that in 1978 and 1979 he became familiar with Kevin Stanford while a youth counselor at a children's detention center. He talked with him again within a week before the trial

began. Jones' avowal testimony continues:

A Yes, sir. I feel that Kevin need to be in an adult institution where the rehabilitation program and the proper training is a lot greater than it is in the juvenile facilities. I think that Kevin need discipline. I think that that Kevin's biggest problem is the lack of discipline in his life as a youth.

.....

A Sir, I truly feel that the death penalty is not appropriate for anyone I guess because my own personal experience that I've had. I am against capital punishment 1000% and I realize that even if Kevin was guilty of the crime, it's not going to bring the victim back. I feel that with his young age, that this man can be rehabilitated. And, if a 17 or 18 year old cannot be rehabilitated, then this is a failure in our correction department instead of the individual.

.....

I feel that this young man should be given this opportunity to place him in the Department of Corrections with the proper type of counseling. Now, I've heard that Kevin had a drug problem. There's no difference between a drug problem and an alcoholic problem.

.....

Q Do you think being in the penal population and being with the population in a penal system will affect Kevin?

A Mentally, yes, sir.

Q How will it affect him?

A I feel that Eddyville will make him or break him. And, I feel with the type of program that they have at Eddyville that he'd never been exposed to in a juvenile facility, that this is another thing, he would have an opportunity to get a GED; he'd have an opportunity to get him a college education; he'd have an opportunity to get into so many type of vocational training and I think that this is what Kevin needs.

.....

Q Do you think a life sentence would wake him up to that fact?

A The life sentence is going to wake him up and the maximum security environment will wake him up.

Stanford argues that the exclusion of Jones' mitigating testimony was error of constitutional magnitude. We disagree and sustain the trial court ruling. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), sets the constitutional perimeters for dealing with the reception into evidence before a trier of fact of mitigating circumstances. The Supreme Court comments:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer [herein the jury], in all but the rarest kind of capital case [footnote omitted], not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Here referring to footnote 12: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"]. [Last three emphases ours.]

KRS 532.025, our death-qualifying statute, provides in part that after a conviction of a crime for which the death penalty may be imposed by jury, the trial shall resume and the prosecuting attorney shall open and the defendant shall conclude the evidence and arguments. The statute says that the judge or the jury shall consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law" and any of the eight statutory circumstances of mitigation.

The thrust of the claim of error was that the trial court erred in not allowing the jury to hear the testimony of Robert Jones because Lockett, supra, through the Eighth and Fourteenth Amendments, requires that the sentencing body consider any

relevant evidence offered by the defense in mitigation of capital punishment. Further, KRS 532.025 authorizes the sentencing body to consider "any mitigating circumstances otherwise authorized by law."

Lockett expresses the minimum factors of what is admissible in complying with the Eighth and Fourteenth Amendments. The factors are the defendant's character, prior record and circumstances of the offense. KRS 532.025 is more expansive in that it spells out eight circumstances of mitigation that are relevant, and it contains a catch-all provision, "any mitigating circumstances otherwise authorized by law." This provision would permit the trial court to submit any redeeming evidence to the jury. However, we believe the evidence must contain facts or a qualified opinion bearing on the defendant's character, prior record or circumstances of the offense, or relative to one of the specified statutory mitigating circumstances.

Utilizing this standard, a review of Robert Jones' proffered testimony shows that it was clearly inadmissible. He had no academic or professional qualifications to allow him to offer opinion evidence. His personal knowledge of Stanford was at best minimal and remote. What very little of his testimony which might conceivably be admissible, such as the rehabilitative prospects of the defendant, was cumulative. The main theme of his testimony concerned his own philosophy about the value of the death sentence. We say clearly that was not admissible. The penalty phase of the trial is not an open forum for the expression of one's personal philosophical beliefs concerning the

propriety of the death penalty. If permitted, the Commonwealth could offer rebuttal testimony about the moral righteousness of the death penalty, the result being that the jury would be bombarded with philosophical and moral opinions, none of which are relevant to the decision it must reach. See Ice v. Com., Ky., 667 S.W.2d 671, 676 (1984). The trial court acted properly by excluding Robert Jones' testimony.

Stanford alleges that prejudicial error resulted when the prosecutor inquired during cross-examination of the appellant's stepfather whether he was aware that the victim was the mother of a small child. George Boller, appellant's stepfather, made a statement as a defense witness on cross-examination that the appellant was going to straighten his life out because he had a child. The prosecutor retaliated by asking Boller if he was aware that the victim had an eleven-month-old child. The matter was objected to and a motion for mistrial was lodged. The prosecutor claimed he was entitled to bring the matter out because Boller had opened the door by making a statement about the appellant's child. The trial court overruled the objection and motion for mistrial but gave the jury an admonition to disregard the nature of the information.

The statements have no relevancy or probative value and would, without question, have been suppressed if the trial court had been forewarned. Regardless, because the statements were injected before the jury, was the appellant denied a fair trial? We say no. The trial court kept the jury's mind in proper perspective with the admonition. It cured any inflammatory

nature of the statement and we see no substance or reversible error pertaining to it. We simply comment that a trial of this magnitude will invariably be marred with occasional minor or surface knicks which, when cured by the trial court, cause no substantial error.

Stanford alleges the prosecutor's closing argument in the penalty phase deprived the appellant of his right to a fair trial consonant with due process of law, as guaranteed by the Kentucky and United States Constitutions, and introduced arbitrary considerations into the jury's decision-making process.

We can see where there was no objection by trial counsel on behalf of the appellant to the prosecutor's remarks because his remarks were so unclear as to be barely intelligible even under our close scrutiny. Such remarks, in our opinion, could hardly mislead anyone hearing them. Therefore, we are not persuaded by appellant's argument and do not read into the prosecutor's remarks that which the appellant reads into them. The prosecutor told the jury that appellant showed no remorse for his crime. The appellant argues that had he shown remorse by outburst before the jury, then the prosecutor would have contended that it was contrived. This assignment of error is so baseless it warrants no further discussion. As in Marlowe v. Com., 709 S.W.2d 424, 431 (1986), we believe the jury would have returned the same sentence regardless of the comments complained of.

The appellant has devoted a substantial portion of his brief to his assertion that KRS 208.170 was applied in an unconstitutional manner in the process leading to the juvenile

court's waiver of jurisdiction over him.⁸ He makes two arguments in support of this claim: (1) that the statute is applied in a racially discriminatory manner and (2) that he was found by the district court to be amenable to treatment.

Stanford has compiled a barrage of statistics in an attempt to persuade us that black youths were treated disproportionately under this statute in the juvenile division of the Jefferson District Court. The most disturbing statistic presented by Stanford is that of 56 grand jury referrals in the years 1975 through 1979, 68% were black juveniles, a group, according to the appellant's statistics, that comprised only 30% of the total number of referrals to juvenile court. He thus concludes that, although white juveniles committed twice as many offenses as blacks, they were referred to the grand jury at a rate of only half that of their black counterparts. We do not believe, however, that these statistics warrant the conclusion that race is in any way a factor in the waiver process.

It is quite possible that the percentages of grand jury referrals can be rationally explained by Stanford's figures which show black youths committed more than half of all the homicides and robberies and nearly half the assaults and rapes. More to the point, though, we find these statistics to be inadequate in drawing any conclusions bearing on this issue. For example, a factor not included in the appellant's analysis and one we

⁸Stanford concedes that the statute is facially valid.

believe crucial in order to find appellant to have set forth a prima facie case of racial discrimination in this context is the percentage, if any, of the 56 grand jury referrals that comprise repeat offenders, those, like Stanford, for whom the state's previous attempts to rehabilitate proved unsuccessful. We are not at all persuaded by Stanford's statistics and find no evidence whatsoever to convince us that Stanford or any other juvenile was directly or indirectly the victim of racial discrimination in waiver proceedings before the Jefferson District Court.

The second aspect of this allegation of error concerns the district court's finding of Stanford's amenability to treatment. Specifically the district court found that Stanford was "emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and reality based therapy for socialization and drug therapy in a residential facility." (Emphases added.) The court further found that such a facility did not exist in this state and concluded that it did not have authority to require the state to provide institutionalization outside the state or, importantly, the authority to keep Stanford institutionalized "for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation"

The thrust of Stanford's argument is that "the state has an obligation not to execute a juvenile who is deemed to be amenable to treatment but for whom the state offers no appropriate treatment program," and that imposing the death penalty violates

the state and federal constitutional prohibitions against cruel and unusual punishment.

We are not unmoved by Stanford's arguments in this regard. Nevertheless, it is apparent from the record that Stanford has been given the benefit of treatment available to youthful offenders in the Commonwealth on a repeated basis over a period of several years before his involvement in the crimes charged in the instant case. Since the age of ten, Stanford has revolved in and out of juvenile court having committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few. We do not know whether the county and state personnel who worked with Stanford in the various facilities in which he was placed are responsible for his failure to be rehabilitated or whether the fault lies within the appellant himself. What is clear, however, from the record and is contained in the district court's waiver order is that there was no program or treatment appropriate for the appellant in the juvenile justice system. Thus, even though he was exposed to the death penalty, the district court did not err in determining that it was in his best interest to be tried as an adult and thereby waiving jurisdiction over the appellant. Sharp v. Commonwealth, Ky., 559 S.W.2d 727 (1977). It was certainly not in his best interest, not to mention that of the community, to be committed to a treatment facility from which, after a brief period of time, he would again be free to murder or otherwise harm as he pleased.

Stanford demands that he has a constitutional right to treatment. We hold that he has already had all the treatment the

Commonwealth can provide. No less than three times in his brief he has reminded us of the previous observation of this Court, that "incurability is inconsistent with youth." Workman v. Com., Ky., 429 S.W.2d 374, 378 (1968). However, as we more recently recognized in Ice v. Commonwealth, supra, at p. 680, the reality, at times, is to the contrary.

In sum, the waiver statute was appropriately followed and not unconstitutionally applied to the appellant. His age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him. We do not believe the penalty to be inconsistent with any constitutional protections or requirements.

We have addressed the merits of all the issues we believe to be of any legal significance. Stanford has raised others which simply do not warrant detailed discussion. For example, he argues there was insufficient evidence to support his conviction for sodomy. Considering the position of the victim's body, that she was partially nude, that she incurred severe bruising to her anus and that the appellant's pubic hairs were found on her bare thigh as well as on other parts of her body or clothing, not to mention his statement to others repeated elsewhere in this opinion that he required her to perform both oral and anal sodomy, there can be no serious contention that there was not sufficiency of evidence to submit this charge to the jury under the standard set forth in Commonwealth v. Sawhill, 660 S.W.2d 3 (1983). Likewise, appellant's claim that the police lacked probable cause to arrest him is frivolous. The police arrested

Stanford after being informed by another juvenile who was caught selling stolen cigarettes that the cigarettes had been obtained from Stanford who admitted stealing them from the Checker station.

The remaining assignments of error are unpersuasive, not because of their argument but because of their lack of legal substance. Because of that we will not comment upon them.

Finally, as in all capital cases, we have reviewed the sentence as required by KRS 532.075. As we stated in Matthews v. Com., supra at p. 709, it is difficult to compare one murder case with another. However, we have no difficulty in stating that the sentence in the instant case is neither excessive nor disproportionate to the penalty imposed in similar cases.⁹

⁹ We have compiled data since 1970 in those cases where a death penalty has come before this Court for review, considering both aggravating and mitigating circumstances in those cases and comparing them with the present case. The cases we have considered are:

- 1) Halvorsen & Willoughby v. Commonwealth, ___ S.W.2d ___ (decided December 18, 1986).
- 2) McClellan v. Commonwealth, Ky., 715 S.W.2d 464 (1986).
- 3) Bevins v. Commonwealth, Ky., 712 S.W.2d 932 (1986).
- 4) Marlowe v. Commonwealth, Ky., 709 S.W.2d 424 (1986).
- 5) Matthews v. Commonwealth, Ky., 709 S.W.2d 421 (1986).
- 6) Holland & James v. Commonwealth, Ky., 703 S.W.2d 876 (1986).
- 7) Kordenbrock v. Commonwealth, Ky., 700 S.W.2d 384 (1985).
- 8) Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985).
- 9) Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985).
- 10) Harper v. Commonwealth, Ky., 694 S.W.2d 665 (1985).
- 11) White v. Commonwealth, Ky., 671 S.W.2d 241 (1984).
- 12) McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984).
- 13) Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984).
- 14) Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980).
- 15) Smith v. Commonwealth, Ky., 599 S.W.2d 900 (1980).
- 16) Hudson v. Commonwealth, Ky., 597 S.W.2d 610 (1980).

(Footnote Continued)

The judgment of the Jefferson Circuit Court is affirmed.
Stephens, C.J., Gant, Lambert, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

ATTORNEYS FOR APPELLANT:

Frank W. Heft, Jr.
Chief Appellate Defender
of the Jefferson District
Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202

Daniel T. Goyette
Jefferson District
Public Defender

ATTORNEYS FOR APPELLEE:

David L. Armstrong
Attorney General

David A. Smith
Assistant Attorney General

C. Lloyd Vest II
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494

(Footnote Continued)

- 17) Boyd v. Commonwealth, Ky., 550 S.W.2d 507 (1977).
- 18) Headows v. Commonwealth, Ky., 550 S.W.2d 511 (1977).
- 19) Self v. Commonwealth, Ky., 550 S.W.2d 509 (1977).
- 20) Lenston v. Commonwealth, Ky., 497 S.W.2d 561 (1973).
- 21) Scott v. Commonwealth, Ky., 495 S.W.2d 800 (1973).
- 22) Tinsley v. Commonwealth, Ky., 495 S.W.2d 776 (1973).
- 23) Galbreath v. Commonwealth, Ky., 492 S.W.2d 882 (1973).
- 24) Caine v. Commonwealth, Ky., 491 S.W.2d 824 (1973).
- 25) Caldwell v. Commonwealth, Ky., 503 S.W.2d 485 (1972).
- 26) Leigh v. Commonwealth, Ky., 481 S.W.2d 75 (1972).
- 27) Call v. Commonwealth, Ky., 482 S.W.2d 770 (1972).

NO. 81 CR 1218
82 CR 0406

JEFFERSON CIRCUIT COURT
NINTH DIVISION

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS

FINAL JUDGMENT

KEVIN STANFORD

DEFENDANT

The defendant at arraignment having entered a plea of not guilty to the following charges included within the indictment; Count 1, Murder, Count 2, Robbery I, Count 4, Sodomy I and Count 5, Receiving Stolen Property Over \$100.00 and having on the 2nd day August, 1982, appeared in open court with his attorney the case was tried before a jury which returned the following verdict on the 12th day of August, 1982: VERDICT NO. 2, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF MURDER - INTENTIONAL UNDER INSTRUCTION NO. I. /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 8, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF ROBBERY IN THE FIRST DEGREE UNDER INSTRUCTION NO. IV AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS, (CONSECUTIV SENTENCE WITH ANY OTHER PRISON SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 10, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF SODOMY IN THE FIRST DEGREE UNDER INSTRUCTION NO. V AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS, (CONSECUTIVELY TO BE SERVED WITH ANY OTHER SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 12, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF RECEIVING STOLEN PROPERTY OVER \$100.00 UNDER INSTRUCTION NO. VI AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 5 YEARS, (CONSECUTIVELY SERVED). /S/ CHARLES B. CORNISH, FOREMAN.

After the jury returned the above verdicts on the defendant the court informed the jury of another phase of trial that they needed to proceed with, that being the Death Penalty Phase. All evidence having been heard for this part of the trial, the jury returned in open court with the following verdict: WE, THE JURY, FIND THE FOLLOWING

TO BE TRUE: THAT AT THE TIME HE KILLED BAERBEL POORE THE DEFENDANT WAS ENGAGED IN A ROBBERY OF CHECKER OIL STATION, 4501 CANE RUN ROAD AND THAT IN THE COURSE OF SO DOING AND WITH INTENT TO ACCOMPLISH THE ROBBERY IN THE FIRST DEGREE HE WAS ARMED WITH A PISTOL; AND THAT AT THE TIME HE KILLED BAERBEL POORE THE DEFENDANT WAS ENGAGED IN DEVIATE SEXUAL INTERCOURSE WITH BAERBEL POORE AND THAT HE DID SO BY FORCIBLE COMPULSION. /S/ CHARLES B. CORNISH, FOREMAN. WE, THE JURY, RECOMMEND THAT THE DEFENDANT, KEVIN STANFORD, BE SENTENCED TO DEATH. /S/ CHARLES B. CORNISH, FOREMAN.

At a hearing held on August 31, 1982, the defendant, in person and by counsel made a motion for a new trial and judgment notwithstanding the verdict, evidence being heard the Court being sufficiently advised hereby ORDERS that the motion be and hereby is overruled.

On the 24th day of September, 1982, the defendant appeared in open court with his attorney, Frank Jewell and Jim Shake, and the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents of said report with the exception of the official version which the defendant denies.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because:

- A. there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge.
- B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.
- C. probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced,

IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of Count 2,

Robbery in the First Degree, and is sentenced to 20 years in the penitentiary; on Count 4, Sodomy in the First Degree, the defendant is sentenced to 20 years in the penitentiary; on Count 5, Receiving Stolen Property Over \$100.00, the defendant is sentenced to 5 years in the penitentiary. These three sentences are ORDERED served Consecutively for a total of 45 years in the penitentiary.

From the circumstances of the present crime and the history of Kevin Stanford, the Court concludes that the defendant, Kevin Stanford is beyond rehabilitation. There is no reasonable possibility that he could be rehabilitated by any type of program, with or without lengthy incarceration. Therefore, the death penalty will be imposed.

On Count 1 of the indictment, Murder, the jury has recommended a death sentence. In the circumstances of this case, no other sentence would be appropriate. Therefore, the motion to reduce the sentence of death to life in prison or term of years, is denied.

The defendant, Kevin Stanford, on Count 1 of the indictment, the charge of Murder, is sentenced to death.

The defendant shall be taken by the Sheriff of Jefferson County and committed to the custody of the Department of Corrections, to be held as such location as the Department shall designate. This Court is required by Criminal Rule 11.04 to set a day for the execution of the death sentence, which shall be on Friday, October 29, 1982.

Pursuant to KRS 431.220, the death sentence shall be executed by causing to pass through the body of the defendant, Kevin Stanford, a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the defendant is dead.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is hereby credited with time spent in custody prior to sentence, namely 343 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford

an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Defendant having made a motion to proceed with appeal in forma pauperis, the court being duly advised hereby sustains said motion.

The defendant further made a motion to stay execution of death sentence pending appeal to the Kentucky Supreme Court, and the court being duly advised sustains said motion.

The defendant, Kevin Stanford is remanded to custody without bond pending appeal.

Charles H. Leibson
CHARLES H. LEIBSON, JUDGE

ATTESTED: A TRUE COPY

PAULIE MILLER, CLERK

BY *Dellie Moore* c.c.

cc: FRANK JEWELL
ERNEST JASMIN

ENTERED IN COURT

SEP 28 1982

PAULIE MILLER, Clerk

By *sm* Deputy Clerk

NO.

JEFFERSON DISTRICT COURT
JUVENILE DIVISION

IN THE INTEREST OF A CHILD
KEVIN STANFORD

FINDING OF FACT; ORDER TRANSFERRING
JURISDICTION UNDER KRS 208.170 TO CIRCUIT COURT

.. ..

This case came on before the Court on the Petition of January 14, 1981, subsequently amended by the Commonwealth with additional facts and charges with the Petition of February 20, 1981 between the two Petitions alleging that in one transaction on January 7, 1981, Kevin Stanford committed the offenses of Robbery 1st Degree, Murder, Sodomy 1st Degree, Rape 1st Degree, Kidnapping and Receiving Stolen Property in a value over \$100, regarding the premises and property of the Checker Oil Station on Cane Run Road in Jefferson County and the person of Barbel Poore.

At arraignment the office of the Public Defender was appointed to represent the Defendant and counsel and member or members of the child's family have been present at all critical stages of the proceedings. The mother is not present at the time of the rendering of this decision.

Subsequent to the arraignment, proof was heard on various motions including a motion to suppress certain evidence based on procedural errors of the police in effecting the arrest. Certain evidence illegally obtained has been ordered suppressed.

On May 22, 1981, a probable cause hearing was held on the Petitions. A motion having been made by the County Attorney to transfer jurisdiction to Circuit Court pursuant to KRS 208.170.

At that hearing proof was heard from Jefferson County Police Detectives, Hall, Smith, Hash, Tangle, Mr. Billings from the Kentucky State Crime Lab or Ms. Billings, Taylor, Evidence Technician Unit, Ms. Kolb from

Metro ID, Mr. Workman from the Coroner's Office, Mr. Sanders, Alex Sloan and Troy Johnson the later being co-defendant, who has plead guilty in Juvenile Court to his participation in the alleged offenses. Probable cause was found of one count Robbery 1st Degree, a count receiving stolen property over \$100, a count of Sodomy 1st Degree and a count of murder. The charge of rape was dismissed.

On July 14, 1981, as well as on August 10, 1981, and subsequently admitted defense evidence on out of state placements, proof was heard on the waiver portion of the transfer hearing. Proof was heard from Mr. Mattingly, of the Department of Human Resources, Mr. Henderson of the Department of Human Resources, Mr. Hildreth, Department of Human Resources, Mr. Matthews, Dr. Williams, Billy Ship, Linda Locking, Ellen Baum Dana Madison of the Urban League as well as filed DHR reports and various records. Based on the proof heard the court finds as to the elements for consideration the following:

1) Seriousness of the offenses - the offense alleged and for which probable cause has been found are of the most serious nature reflected by the offense against persons as a disregard for human life.

2) Age and sophistication of child - Kevin Stanford was born August 23, 1963. The offense was committed when he was 17 and he has subsequently turned 18 in the detention center. Various testimony was heard regarding his emotional maturity and sophistication. Proof was heard and the Court finds that he has a low internalization of the values and morals of society and lacks social skills. That he does possess an institutionalized personality and has, in effect, because of his chaotic family life and lack of treatment, become socialized in delinquent behavior. That he is emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and

reality based therapy for socialization and drug therapy in a residential facility.
from the record the followings:

Petition and dates from records - The child has been placed in the DHS Group Home, Ormsby Village Treatment Center, Green River Boys Camp, the Department of Human Resources and Rice Audobon Vocational Educational Programs, as a result of delinquency petitions. His progress has been marginal in each based in part on the failure of the County and State to provide meaningful therapy for the child or after care intervention when he was returned after a relatively short time in each placement, to the streets of Jefferson County. His progress was basically that he learned how to behave enough to meet the minimal criteria for release each time approximately or roughly 6 months after placement, then cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated.

As to the reason of prospects of rehabilitation in facilities available to the District Court Juvenile session, other than the possibility of a bridge status commitment to the State Department of Human Resources with a minimum of approximately six months in an institution, the only facilities for a youth or child of his age with his problems would be out of state placements in specialized long term programs for youth, as per proof the child may benefit from such placement. However, the Court lacks statutory basis to order the state to provide such institutionalization for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation, and the State of Kentucky Department of Human Resources does not, nor does Jefferson County provide a meaningful alternative.

Therefore it is the finding of the Court that it is in the interest of the community and in the interest of the child that Kevin Stanford be transferred to

Circuit Court and tried under the ordinary laws governing crime. At this time a Grand Jury date is set down for November 5.


RICHARD J. FITZGERALD, Judge
Jefferson District Court

10/28/81
DATE

ORIGINAL

NO. 5785

SUPREME COURT OF THE UNITED STATES

U.S. DEPT. OF JUSTICE
FILED

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CLERK

W. J. a

JOHN M. STANLEY

PETITIONER

VERSUS

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

ORIGINALS OF

RECORD

JOHN A. ARMSTRONG

C. LLOYD VEST II

*Counsel of

QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD THE COURT GRANT CERTIORARI TO
CONSIDER AN ALLEGED ERROR OF STATE LAW?

II.

DO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS
FORBID JOINDER OF DEFENDANTS FOR TRIAL WHERE
ONE IS ELIGIBLE FOR CAPITAL PUNISHMENT BUT THE
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NO. 87-5765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

KEVIN W. STANFORD PETITIONER

VERSUS ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Respondent accepts Petitioner's citation to the opinion
below.

JURISDICTION

Respondent accepts Petitioner's statement of juris-
diction.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are
reproduced in the appendix to the petition.

COUNTERSTATEMENT OF THE CASE

The victim in this case, twenty-year-old Barbel Poore,
was an employee of the Cheker gas station on Case Run Road in
Louisville, Kentucky (TE 399, 942, 947). She and her parents
were acquainted with Petitioner, having conversed with him on
several occasions (TE 519). Petitioner lived in the apartment
complex adjoining the Cheker station (TE 407-408, 475).

Troy Johnson was a mutual friend of both Petitioner and his co-defendant, David Buchanan (TE 1029, 1047). On January 7, 1981 Buchanan approached Johnson with a plan to rob the Cheker station (TE 1029-1030). Johnson provided Buchanan with a handgun (TE 1031).

Buchanan telephoned Petitioner in regard to the plan (TE 1032-1033). The three met at Petitioner's apartment, then proceeded to the Cheker station where Johnson remained inside the car (TE 1032-1034). As Petitioner was leaving the car to go inside the Cheker station, he expressed concern to Buchanan and Johnson that the victim might recognize him by his clothing (Id.).

During the next forty-five minutes, Barbel Poore was robbed, raped, orally sodomized, and anally sodomized (TE 364-365, 372, 398, 405, 485-486, 946, 1034-1035, 1044, 1053). Once during this ordeal, Buchanan returned to the car with a two-gallon can of gasoline and told Johnson to continue waiting (Id.). The sexual attack took place on the restroom floor of the gas station (TE 485). Petitioner initially raped the victim in a standing position while she held onto the sink, after which he and Buchanan took turns raping and sodomizing her on the floor (Id.)

Eventually, Buchanan returned to Johnson's car a second time and instructed him to follow Petitioner, who was driving the victim in a car belonging to her mother (TE 1035-1037). After both cars arrived at a secluded area on Shanks Lane in Louisville, Buchanan got out and walked over to the victim's car where Petitioner was standing (Id.).

Petitioner allowed the victim to smoke a cigarette before killing her execution-style (TE 486). Petitioner leaned inside the victim's car and shot her in the face from point-blank range (TE 364, 366-367, 1037). After this shot was fired, Johnson exited his car, poured the stolen gasoline into his tank, started it, and began backing up (TE 1037-1038). Petitioner then fired a second shot into the back of the victim's head, causing her death (TE 364, 366-368, 372, 486, 1037-1038).

Two passersby observed Petitioner and Buchanan walking from the victim's car back to the getaway car (TE 954-955, 985-987). Though able to describe their general appearance, Amona Dorsey could not identify Petitioner or Buchanan (TE 986-987). Kerise Ison, a passenger in Dorsey's car, heard the gunshots and became suspicious when one of the defendants put his head down (TE 954-955). Ison noticed that the one who put his head down was "tagging behind" the other and that he put something inside his coat pocket (TE 957, 963).

The victim's corpse was left kneeling in the back seat of her mother's car, naked from the waist down and with her buttocks elevated (TE 401). A "large volume of semen" was on the left sleeve, front and back hem of her outer jacket, on her inner jacket, on her sweater, on her panties, and on the back seat of her mother's car where her head lay. (TE 401, 792-793, 796-798, 800, 805-806). Among the foreign pubic hairs on the victim's buttocks was one similar in microscopic characteristics to those belonging to Petitioner (TE 578, 585, 602, 604, 645, 792, 794-795, 807, 811). Injuries to the victim's anus included a

contusion "with radiating abrasions over the anal mucosa over the entire circumferential surface," inside of which were "large quantities of identifiable spermatozoa." (TE 363-365).

Buchanan got into the front seat of Johnson's two-door car before Petitioner got into the back seat (TE 1040). As they were driving away from the murder scene, Petitioner smiled and asked Johnson whether he "wanted to do anything else." (TE 1041). When Johnson responded negatively, Petitioner tossed the murder weapon into the front seat (Id.). Johnson dropped him off at the intersection of Shanks Lane and Cane Run Road, across the street from the Cheker station (Id.).

Later that night, a neighbor named Alexis Sloan saw Petitioner carry two large boxes of cigarettes away from the Cheker station (TE 1003, 1006-1007). Sloan agreed to "hold" them for Petitioner (TE 1008). On the following day, Sloan and one Owen Smyzer put the cigarettes into plastic garbage bags and roamed about the neighborhood selling them (TE 1011-1012). Afterwards, Petitioner told Sloan that the cigarettes were from the Cheker station and that he had "made a play" for them (TE 1013-1014, 1022-1023).

While awaiting trial for capital murder, Petitioner sneaked up behind a security guard, put the end of a pencil against his ear and said, "Click, click, click, just like the girl, I'm going to blow your mother. . . brains out." (TE 1062-1063).

On another occasion, a different corrections officer heard Petitioner bragging to seven other juvenile inmates about what he had done to Barbel Poore (TE 1076-1078). Petitioner

boasted to the corrections officer about his having sodomized and raped the victim (TE 1080). He explained the execution of the victim as follows:

I had to shoot her, the bitch lived next door to me and she would recognize me. * * * I guess we could have tied her up or something or beat the . . . out of her and told her, if she tell, we would kill her. (TE 1082).

At that moment during his conversation with the corrections officer, Petitioner "began laughing." (Id.).

Petitioner was convicted of capital murder, first degree sodomy, first degree robbery, and receiving stolen property. (TR 81-CR-1218, 18-21, 28-31). He was sentenced to death and 45 years in prison (TE 1542; TR 82-CR-0406, 314). His jointly-tried co-defendant, David Buchanan, was convicted of murder, first degree sodomy, first degree robbery, and first degree rape. Exempted from capital punishment because he was not the "triggerman", Buchanan was sentenced to life and 60 years in prison. Buchanan v. Commonwealth, Ky., 691 S.W.2d 210 (1985), affirmed, Buchanan v. Kentucky, ___U.S.___, 107 S.Ct. 2906 (1987).

ARGUMENT

I.

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER AN ALLEGED ERROR OF STATE LAW.

On the first morning of trial, Stanford filed a document entitled "Voir Dire", which contained 23 questions dealing with the veniremen's exposure to pre-trial publicity and their understanding of reasonable doubt (R 201-203, 82-CR-0406). Stanford also filed a document entitled "Defendant's Proposed Voir Dire Questions Concerning Capital Punishment", which

included 29 questions. That list included questions concerning the defendant's right not to testify, their ability to consider the death penalty, their ability to consider a penalty less than death, and other miscellaneous matters.

During their discussion that morning, the trial judge informed counsel that he would question the veniremen individually concerning their ability to consider the death penalty and their ability to serve for 2 weeks (TR 38-39). While discussing which questions would be asked during individual voir dire, Stanford's counsel noted, "We have tendered proposed questions to the capital phase which I take it are overruled?" (TR 39). The judge responded, "Yeah." (TR 39). Counsel then requested the judge to address pre-trial publicity in the individual examinations and the judge agreed to do so. (TR 39-40). Counsel did not indicate other areas he felt should be addressed during individual voir dire. The judge then indicated that, after individual voir dire was completed, counsel would be permitted to address other matters during several examinations of the panel (TR 40-42). Although Stanford alleged on appeal that the judge's ruling unconstitutionally restricted his voir dire examination, the only issue raised by the exchange described above was whether the trial judge erred by failing to include these questions in the individual voir dire examination. Allocation of the voir dire questioning is purely a question of state law.

Kentucky Rule of Criminal Procedure (RCr) 9.38 provides:

The court may permit the attorney for the Commonwealth and the defendant or his attorney to conduct the examination of

prospective jurors or may itself conduct the examination. In the latter event the court shall permit the attorney for the Commonwealth and the defendant or his attorney to supplement the examination by such further inquiry as it deems proper. The court may itself submit to the prospective jurors such additional questions submitted by the parties as it deems proper.

The Kentucky Supreme Court has noted that the separate examination of jurors or prospective jurors is a matter of procedural policy. Ferguson v. Commonwealth, Ky., 512 S.W.2d 501 (1974). Furthermore, that court has consistently held that the manner of conducting voir dire is left to the trial judge and his actions will not be disturbed unless he abuses his discretion in the manner in which the examination was conducted. Wilson v. Commonwealth, Ky., 601 S.W.2d 280 (1980) and Ferguson, supra. Most importantly, that rule includes the trial court's decision to require counsel to voir dire jurors collectively, rather than individually. Woodford v. Commonwealth, Ky., 376 S.W.2d 526 (1964). Judge Leibson simply limited the number of questions he would address during individual voir dire, allowing counsel to conduct further inquiry during collective voir dire. The judge did not abuse his discretion by declining to conduct all of the voir dire on an individual basis. If there was any abuse involved, it was simply a violation of Kentucky's Procedural Rule. Because no federal question is involved, the writ should be denied. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Palmer v. Ohio, 248 U.S. 32 (1918).

Kentucky recognizes that, on appeal and in his petition, Stanford has attempted to extrapolate the judge's perfunctory "Yeah" into a blanket restriction on Stanford's

ability to ask any of the tendered questions, particularly those questions intended to "life-quality" the jury. However, this claim is refuted by the facts of the case. Stanford clearly states, "Defense counsel tendered a list of questions concerning capital punishment and pretrial publicity which he wanted the court to ask". (Petition at 10). Therefore, his position must be that the trial judge's decision not to ask those questions individually must have led trial counsel to believe that counsel was barred from asking any of the questions on the 2 lists. In fact, Stanford argues counsel chose not to ask any of the "life-qualifying" questions based upon that belief, coupled with counsel's fear of a contempt sanction if he dared to determine the scope of the judge's ruling. The Court should immediately note counsel's lack of temerity on this point by his immediate request that the trial judge modify his ruling so that pre-trial publicity would be included in individual voir dire (TR 39). This request clearly shows that counsel understood the judge's ruling to be exactly what it was - an allocation of topics between individual and collective voir dire. Stanford's argument is further undermined by the fact that the trial judge indicated that counsel would explore other topics, including reasonable doubt, during collective voir dire. Stanford's counsel did, in fact, address reasonable doubt during general voir dire (TR 303). Finally, counsel addressed Stanford's right not to testify - a topic included in his proposed capital voir dire list - during general voir dire (TR 303). These actions plainly refute Stanford's claim that counsel believes that the trial judge imposed a blanket restriction on counsel from asking his proposed questions. Counsel simply failed to ask.

If the Court should conclude that a federal question was implicated, Kentucky would argue that this failure to ask amounted to an independent and adequate state ground for the Kentucky Supreme Court's decision. Although Kentucky conceded and the court recognized that a capital defendant has a right to life-qualify the jury under the principles of Wainwright v. Witt, 469 U.S. 412 (1985), the Kentucky Supreme Court denied relief because there was no ruling on the merits of counsel's ability to employ this procedure. Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 786 (1987). Based upon that resolution, Kentucky would argue that the decision to deny relief rests squarely upon a finding of procedural default.^{1/} This is especially so where the Kentucky Supreme Court recognizes that a federal constitutional right exists, but denies relief because counsel failed to obtain a ruling.^{2/} Although the opinion does not contain a plain statement that this ruling is based upon Kentucky law, the decision does clearly and expressly indicate that it is based on bona fide separate, adequate and independent state grounds. Michigan v. Long, 465 U.S. 1032, 1041 (1985). The writ should not issue.

1/. Kentucky specifically argued that the claim should be dismissed due to the procedural default, citing White v. Commonwealth, Ky., 611 S.W.2d 529 (1980).

2/. Contrary to Stanford's assertion, Kentucky has seen several capital proceedings where defense counsel has employed the "trial strategy" of building reversible error into the record. Although there is a question about the ethical propriety of such a strategy, the practice is a reality in this state. See, e.g., Arguments IV and V. Counsel's action would satisfy the Kentucky Supreme Court's ruling that it would not disregard a claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic.

II.

THE CONSTITUTION DOES NOT REQUIRE SEVERANCE
OF DEFENDANTS FOR TRIAL SIMPLY BECAUSE ONE
FACES A DIFFERENT POSSIBLE PUNISHMENT THAN
THE OTHER

Petitioner argues that he was entitled to a separate trial by reason of co-defendant Buchanan's ineligibility for the death penalty. Disclaiming there is any benefit to be derived from a joint trial, Petitioner contends that the Constitution forbids joinder of defendants for trial unless all face the identical possible punishment. According to Petitioner, it is fundamentally unfair for the sentencer to learn that the government considers one participant in a crime more culpable than the other.

Kentucky responds that the virtues of a joint trial are many. The disadvantages, if any, are few. Beyond the obvious economical considerations is the fact that a joint trial affords the fact-finder a greater perspective on the whole case. It enables the sentencer to more accurately assess relative culpability of all the participants in a crime, or series of crimes as in the present case. A joint trial also ensures against inconsistent results by allowing the same sentencer to determine the appropriate punishment for all those who took part in the crime. In a joint trial the sentencer need not speculate as to the possible punishment a co-defendant might receive in a separate proceeding. In addition, it avoids the fortuitous result of one defendant gaining a tactical advantage over the other by being the last to be tried. This further minimizes delay in the punishment of crimes, all of which promotes reliability in the judicial process.

Twice last term, the Court spoke at some length on the significant benefits a joint trial generally confers upon all concerned. In Richardson v. Marsh, ___U.S.___, 107 S.Ct. 1702 (1987) the Court said:

Joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years. Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Feb. 20, 1987). Many joint trials -- for example, those involving large conspiracies to import and distribute illegal drugs -- involve a dozen or more codefendants. * * * It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. Id. at 1708 (emphasis added).

In Buchanan v. Kentucky, ___U.S.___, 107 S.Ct. 2906 (1987) the Court observed that:

As demonstrated by the statutory provision providing for joinder of offenses and defendants^{3/} . . . the Commonwealth has determined that it has an interest in providing prosecutors with the authority to proceed in a joint trial when the conduct of more than one criminal defendant arises out of the same events. Underlying the Commonwealth's interest in a joint trial is a related interest in promoting the reliability and consistency of its judicial process, an interest that may benefit the noncapital codefendant as well. In joint trials, the jury obtains a more complete view of all the facts underlying the charges than would be possible in separate trials. From such a perspective, it may be able to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing. See ABA Standards for Criminal Justice 13-2:2 (2d ed. 1980). This jury perspective is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events, where there is a single victim, and where, in fact, the defendants are indicted on several of the same counts. Id. at 2915 (emphasis added).

The Commonwealth's interest in a joint trial is also bound up with a concern that it not be required to undergo the burden of presenting the same evidence to different juries where, as here, two defendants, only one of whom is eligible for a death sentence, are charged with crimes arising out of the same events. Id. at 2915.

^{3/}. See RCr 9.12, permitting joinder of defendants for trial, and RCr 6.18, permitting consolidation of offenses for trial.

Owing to this preference for joint trials, a criminal defendant is not entitled to severance unless he makes a positive showing prior to trial that joinder would be unduly prejudicial to him. RCr 9.16; Commonwealth v. Rogers, Ky., 698 S.W.2d 839 (1985). The trial judge has considerable discretion in ruling upon such a motion. Wilson v. Commonwealth, Ky., 695 S.W.2d 854, 858 (1985).

In this case, co-defendant Buchanan faced the same possible punishment as Petitioner until shortly before trial. (TR 61-CR-1218, 18-21, 28-31). Prior to trial, however, Buchanan sought:

. . . dismissal of the capital portion of the indictment against him on the basis that Stanford had been the triggerman, that [Buchanan] had no intent to kill Poore, and that, therefore under Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 140 (1982), [Buchanan] could not be sentenced to death. . . . Without opinion and with no objection from the prosecution, the court granted this motion. Buchanan v. Kentucky, supra, 107 S.Ct. at 2910 (emphasis added).

The foregoing underscored language refutes Petitioner's contention that the trial judge invaded the province of the jury in assessing relative culpability. The trial judge did not make any factual or legal determination that one defendant was more blameworthy than the other. The prosecutor conceded Buchanan's point, effectively withdrawing his request for the death penalty against that particular defendant. The trial judge could not very well require the prosecutor to oppose the motion and seek Buchanan's death. Neither was the trial judge required to grant Petitioner a separate trial on this basis alone.

Petitioner's complaint in this case boils down to an unfounded contention that Buchanan might have been the triggerman after all. There was no such evidence, however.

Petitioner failed to positively show, before trial, that joinder would be unfairly prejudicial to him. Commonwealth v. Rogers, supra; Wilson v. Commonwealth, supra. Buchanan's involvement in the killing of Barbel Poore was impressive. He had planned the robbery; he enlisted the assistance of Petitioner and Troy Johnson; he timed the robbery so that the victim would be closing up the gas station and therefore alone; he not only procured the murder weapon, but insisted that ammunition be supplied for the gun; he directed Johnson to follow Petitioner from the gas station to the murder scene; he stood next to Petitioner when the gunshots were fired; he had the same motive as Petitioner for permanently silencing the victim. Buchanan v. Commonwealth, Ky., 691 S.W.2d 210, 211-212 (1985). The significance and extent of Buchanan's participation in the murder might have been lost on the jury in his absence from Petitioner's trial. Petitioner could only have benefitted by being tried together with Buchanan. Severance of defendants for trial was not constitutionally required. See Shaffer v. United States, 362 U.S. 511 (1960), where it was observed that even an improper joinder of defendants for trial is not a constitutional violation in and of itself. See also United States v. Lane, ___U.S.___, 106 S.Ct. 725, 730, n. 8 (1986), to the same effect.

The petition for writ of certiorari should be denied accordingly.

III.

THE KENTUCKY SUPREME COURT'S DECISION IN THIS CASE IS CONSISTENT WITH LOCKETT V. OHIO. ALTERNATIVELY, ANY TECHNICAL VIOLATION THEREOF WAS HARMLESS BEYOND A REASONABLE DOUBT.

During the penalty phase of the trial, Stanford called Robert Jones to testify. (TR 1483). The Commonwealth objected to this testimony as irrelevant because it was too narrowly focused upon Mr. Jones' experience as a former death row inmate. Defense counsel argued that Jones should be allowed to give his philosophical opinion of whether the death penalty should be rendered, with his knowledge of Stanford (TR 1485). The trial court tentatively sustained the objection, subject to change after hearing Jones' testimony on avowal. (TR 1486-1487). See RCr (Ky. Rule of Crim. Proc.) 9.52.

During this avowal testimony, Mr. Jones noted that he had been associated with four programs which dealt with juveniles. (TR 1488). Mr. Jones was also vice-chairman of the Kentucky Coalition Against the Death Penalty. (TR 1488-1489). From his testimony, it was apparent that his primary function was to gather information concerning the death penalty and to travel around the country speaking out against the death penalty. (TR 1489-1490, 1492-1493, 1496). In fact, it was apparent that Mr. Jones' almost exclusive reason for testifying was to once again vocalize his opposition to the death penalty in general, relating this to his personal experience and philosophy and to the philosophies of other speakers, specifically the widow of Dr. Martin Luther King. (TR 1490, 1492-1497). Mr. Jones testified

on avowal that he had become acquainted with Stanford while Jones was a youth counsellor at the children's center. During 1978 and 1979⁴ (TR 1490-1491), Jones did speak to Stanford on at least one occasion during the week prior to trial, at the request of Stanford's attorney, (TR 1491).⁵ The only testimony by Jones that even remotely related to Stanford was that, in Jones' opinion, incarceration in an adult institution would be more appropriate because such an institution would provide control and rehabilitation programs. (TR 1491-1492, 1494).⁶ At the conclusion of Jones' avowal testimony, the trial court ruled that Jones was not qualified to give his opinion concerning Stanford's chances for rehabilitation and that his testimony was merely cumulative, at best. (TR 1498-1500).

4/ It is significant that Jones did not provide any details concerning his relationship with Stanford during this period--the number of times they had talked, the average length of these conversations, or the nature of the conversations. (TR 1490-1491). Based upon his limited testimony, the court could have reasonably concluded that Jones simply knew Stanford to the extent that they would speak as they passed.

5/ The fact that Jones' personal knowledge concerning Stanford was all but non-existent was evidenced by Jones' comment, "...I've heard that Kevin had a drug problem." (TR 1493), emphasis added. As the proponent of this testimony, Stanford had the burden of showing that Jones had sufficient knowledge to provide relevant testimony about Stanford's character or prior record. Kentucky submits that Stanford did not meet that burden.

6/ In reality, this testimony did not actually relate to Stanford's character or prior record. As with his other testimony, Jones was simply voicing his preference for imprisonment over the death penalty, in general.

Certiorari is not necessary to develop the law in this area. The Court clearly defined the parameters for admissibility of such testimony in Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), by holding that the sentencer, in all but the rarest kind of capital case, be allowed to consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. However, the Court specifically noted that nothing in the opinion limited the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense. Lockett, 438 U.S. at 604, n.12. Jones' testimony was properly excluded because it did not have any bearing on those three factors. Similar testimony was also excluded by the Georgia Supreme Court in Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, 672-673 (1980). Cf. Evans v. Thigpen, 631 F. Supp. 274 (S.D. Miss. 1986), affirmed, Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. den., 107 S.Ct. 3278 (1987). The decision of the Kentucky Supreme Court was consistent with Lockett.

Even if the Court should find a technical violation of Lockett, Kentucky would submit that such error was harmless because Jones' testimony was simply cumulative.⁷ As noted earlier, Jones' testimony purportedly related to Stanford was

7/ The Court has indicated that a violation of Lockett is subject to harmless error analysis. Witchcock v. Dugger, 451 U.S. _____, 107 S.Ct. 1821, 1824, (1987); Skipper v. South Carolina, 476 U.S. _____, 106 S.Ct. 1669, 1673 (1986).

specifically that an adult penal institution would be the more appropriate remedy for him because such an institution provides control and rehabilitative programs. This information had already been presented to the jury through earlier witnesses. Stephen Smith testified about the rehabilitative programs available at adult penal institutions. (TR 1379-1381). Dana Mattison, James Berry, Linda Luking, and Lloyd Davis testified that Stanford needed some form of control in his environment. (TR 1411-1412, 1439-1443). Finally, Mr. Davis testified that Stanford could be rehabilitated in the penal system. (TR 1460). Any error was harmless. The writ should be denied.

IV.

ASSUMING THE HOLDING OF CARTER V. KENTUCKY SHOULD BE EXTENDED TO THE PENALTY PHASE OF CAPITAL PROCEEDINGS, WOULD SUCH AN INSTRUCTION WOULD NOT BE REQUIRED WHERE THERE IS NO "PROPER REQUEST" FOR SUCH INSTRUCTIONS.

Stanford urges the Court to extend the holding of Carter v. Kentucky, 450 U.S. 288 (1981) to the penalty phase of capital trial proceedings. While agreeing that the Court has not addressed this question, Kentucky would submit that this case does not provide the Court with a proper vehicle to resolve the issue.

In Carter, the Court held that the Fifth Amendment requires that a criminal trial judge must give a "no-adverse-inference" jury instruction, upon proper request, during the guilt phase of a criminal proceeding. Carter, 450 U.S. at 300, 305. (emphasis added). Kentucky incorporated this holding into its Rule of Criminal Procedure 9.54(3).

However, the Kentucky Supreme Court has consistently noted that the Carter holding only required such an instruction upon proper request. James v. Commonwealth, Ky., 679 S.W.2d 238, 239 (1984), Ice v. Commonwealth, Ky., 667 S.W.2d 671, 677 (1984), and Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 44 (1983). Therefore, before deciding whether to extend Carter to the penalty phase of capital proceedings in a general proposition, the Kentucky Supreme Court was first required to determine whether Carter was triggered, in this proceeding, by a proper request.

At the time of this trial, Kentucky Rule of Criminal Procedure (RCr) 9.54(2) provided:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes his objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection. (emphasis added).

Although the Rule provides a defendant three different formats for making a request, the Rule clearly requires that the particular objection must be fairly and adequately presented to the trial judge for the request to be proper. The Kentucky Supreme Court recognized this to be true in Long v. Commonwealth, 559 S.W.2d 382 (Ky. 1977). In Long, that court imposed a rule of strict compliance with the RCr 9.54(2)

requirement that a defendant must fairly and adequately present his position to the trial court. Although Long had tendered an instruction, the Kentucky Supreme Court found that he had not made a proper request for a different instruction because the tendered instruction was not in proper format and Long did not orally advise the trial court of his specific objection to the instruction given. That court was required to reach the same conclusion on the facts of this case.

During the guilt phase of the trial, the judge noted, "We need a Fifth Amendment instruction." (TR 1186). Stanford's counsel indicated that he had submitted a version he considered to be a little more detailed (TR 1186-1187). Because counsel had tendered his proposed instructions to the court reporter, he provided the judge with a copy of his proposed version of this instruction (TR 1187). Finding the Commonwealth's proposed instruction sufficient, the judge overruled Stanford's proposed instruction (TR 1187). As Instruction Number 12, the judge instructed the jury that they shall not draw any inference of guilt from Stanford's election not to testify and shall not allow it to prejudice him in any way (TR 1257). Kentucky believes that it is important to note that, during the discussions concerning instructions for the guilt phase, Stanford's attorney stated, "As usual, we are submitting separate reasonable doubt, burden of proof, presumption of innocence and indictment instructions in our packet." (TR 1187-1188).

During their discussion concerning instructions during the penalty phase, Stanford did not specifically request that a "no adverse inference" instruction be given (TR 1361-1366). Instead, counsel merely voiced a general objection to the instructions and noted that he had provided the court with a copy of his tendered instructions (TR 1365). Contrary to his stated practice, counsel did not tender a separate "no adverse inference" instruction. Instead, he had language to that effect in two other instructions.

On lines 34 and 35 of his 44-line tendered instructions, entitled "Instruction at Beginning of Hearing", was the sentence, "The defendant is not required to testify and cannot hold it against him if he chooses not to testify." From the record, it appears that counsel agreed to the judge's decision to use the Commonwealth's version of his instructions (TR 1361). In any event, counsel did not bring this language to the judge's attention (TR 1361). The last two sentences of Stanford's tendered "reasonable doubt" instructions provided, "You are further instructed that Kevin Stanford is not required to testify in the penalty phase hearing. His election not to testify cannot be construed as having any weight against him, nor shall you consider that fact against him." Stanford did not object to the instruction given regarding reasonable doubt nor did he bring the above language to the court's attention. (TR 1361-1366, 1507-1508).

Stanford did not follow his stated practice of submitting a separate instruction regarding "no adverse inference" and compounded the problem by hiding such language in other instructions. Absent an objection which would have called this language to the judge's attention, Stanford did not "fairly and adequately" present his position to the trial court. Therefore, there was no "proper request" for Carter purposes. Assuming arguendo that Carter should be extended to the penalty phase of capital proceedings, this litigant is not entitled to relief. The writ should not issue.

V.

THE JURY INSTRUCTIONS GIVEN ON SENTENCING OPTIONS WERE SUFFICIENT, AND STANFORD WAS NEITHER PROCEDURALLY NOR SUBSTANTIVELY ENTITLED TO ANY OTHER SUCH INSTRUCTIONS.

At the outset, Kentucky would note that it urged the Kentucky Supreme court to summarily reject Stanford's argument that the capital sentencing instructions were constitutionally defective, based upon Stanford's procedural default. Under RCr 9.54(2), Stanford was required to fairly and adequately present his argument to the trial judge's attention. (CP, Argument IV). Stanford did not submit a separate instruction that would have advised the jury that a finding that an aggravating circumstance existed did not require them to vote for the death penalty. Instead, on lines 19-22 of its 44 line tendered instruction, entitled "Instruction At Beginning of Hearing," Stanford inserted the following sentences:

A finding that the aggravating factors do exist does not mean that you must give the death penalty to Kevin N. Stanford. The question of whether Kevin N. Stanford is put to death is left to your discretion.

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From an examination of the record, Kentucky believes that counsel agreed with the judge's decision to use the prosecutor's version of this instruction. (TR 1361). In any event, Stanford did not object, with supporting grounds, to the instruction that was given. (TE 1361). Stanford also relied, on appeal, on his tendered "Reasonable Doubt" instruction which contained the sentence, "Even if you believe the aggravating circumstances exist beyond a reasonable doubt you are not bound to return a finding of death." Again, Stanford did not object to the instructions that were given regarding reasonable doubt, or bring the above language to the court's attention. (TR 1361-1366).

Even if Stanford had properly preserved this claim of error, he was not entitled to relief. The cases cited by Stanford simply require that the instructions clearly inform the jury that they could impose a sentence of imprisonment despite the existence of an aggravating circumstance. As the Georgia Supreme Court held in the seminal decision of Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, 291-292 (1978):

[I]n considering the adequacy of a jury charge on the sentencing phase of the trial, the ultimate test is whether a reasonable juror, considering the charge as a whole, would know that he should consider all the facts and circumstances of the case as presented during both phases of the trial (which necessarily include any mitigating and aggravating facts) and that, even though he might find one or more of the statutory aggravating circumstances to exist, would know that he might recommend life imprisonment. This test is substantive rather than formalistic and conforms with the mandate of the Supreme Court of the United States that "a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." [citations omitted].

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Accord Goodwin v. Balkom, 684 F.2d 794 (11th Cir.

1982). The instructions in this case complied with the requirement of Spivey and the other cases.

Instruction Number 3 provided:

"... you cannot recommend that he be sentenced to death unless you are satisfied from the evidence beyond a reasonable doubt that at least one of the statements listed as (a) and (b) in Instruction Number 1 (aggravating circumstances) is true in its entirety. . . . You are further instructed that a sentence of life or term of twenty (20) years imprisonment or more can be returned even if you believe the number of aggravating circumstances are weaker than the number of mitigating circumstances, or even if you believe that no mitigating circumstances exist." (TR 1507).

Instruction No. 4 provided:

(a) If you have a reasonable doubt as to the truth or existence of any one of the 'aggravating circumstances' listed in Instruction Number 1, you shall not make any finding with respect to it.

(b) If upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall recommend a sentence of imprisonment instead. (TR 1507-1508).

As the Court can see, the jury was first informed that they could not impose the death penalty unless they found the existence of an aggravating circumstance beyond a reasonable doubt. The jury was then informed that they could impose a sentence of imprisonment even if they believed there were less mitigating than aggravating circumstances or even if they found that no mitigating circumstances existed. Finally, they were instructed that if they had a reasonable doubt, on the whole

case, that the death penalty was appropriate, they shall recommend a sentence of imprisonment instead. These instructions clearly informed the jury that they could impose a sentence of imprisonment despite the existence of an aggravating circumstance.

Stanford has failed to show a conflict between the decision of the Kentucky Supreme Court and decisions of other jurisdictions. Certiorari should be denied accordingly.

VI.

PETITIONER'S POST-ARREST CONFESSION WAS NOT OBTAINED IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION OR RIGHT TO COUNSEL. NEITHER DID IT YIELD PHYSICAL EVIDENCE SUBJECT TO THE EXCLUSIONARY RULE.

After securing the crime scenes, police canvassed the apartment complex adjoining the Cheker gas station. (SH I 12). There, Audrey Jackson and other tenants provided information suggesting that Petitioner had participated in the crimes. (SH I 16; III 312-313; IV 473-474).

Police picked up Petitioner and, with his mother's prior consent, took him to headquarters where he denied any participation in the crimes. (SH I 14-15, 91-99). Petitioner eventually requested counsel, at which time the questioning promptly ceased and a public defender was contacted on his behalf. (SH I 15-18, 1000-103). Petitioner and his public defender left the police station without any charges being brought (Id).

Very shortly thereafter, when the information provided by Audrey Jackson and the other apartment complex tenants was corroborated by Owen Smyzer and Alexis Sloan, police arrested

Petitioner for Receiving Stolen Property. (SH I 83-85) Smyzer and Sloan gave statements against their own penal interest by admitting to police that they had assisted Petitioner in disposing of the cigarettes stolen from the Cheker gas station. (SH I 21-25). It had been reported by informants other than the apartment complex tenants that Smyzer and Sloan rode around town selling cartons of cigarettes out of plastic garbage bags. (SH I 21-25; III 307-308).

Sloan told police that he had seen David Buchanan in the company of another black male at 7:00 on the night in question. (SH III 321, 329). At that time they were sitting inside a green car on the apartment complex parking lot next to the Cheker gas station. (*Id.*) At 10:45 that night, Sloan saw Petitioner carry away two large boxes of cigarettes for which he had "just made a play", *i.e.*, he had stolen them. (SH III 322, 338; IV 475). At Petitioner's request, Sloan took some of the cigarettes and then he divided them with Smyzer. (SH II 223). On the following day, Petitioner told Sloan that the cigarettes were from the Cheker gas station "where the lady was killed." (SH III 323). In his tape recorded statement, Sloan told the police:

I asked him, you know, where they come from, he said his buddy and him had took this girl over to Shanks Lane, they had shot her in the head. He said he didn't have nothing to do with the shooting....(SH III 346).

This corroborated Smyzer's statement to the same effect, all of which gave the police probable cause to arrest Petitioner. (SH I 21-25, 83-85; II 225-226). By that time, of course, the police already knew from their investigation of the

crime scenes that: (i) the victim had been executed on Shanks Lane, (ii) with a gunshot to the head, (iii) in connection with the theft of approximately 300 cartons of cigarettes from the Cheker gas station. Thus the informants' tips were sufficiently detailed, and corroborated by independent investigation, to give the police probable cause to arrest Petitioner. Under Kentucky law,

Probable cause exists when the facts and circumstances within the arresting officers' knowledge or of which they have reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed or is being committed. Shull v. Commonwealth, Ky., 475 S.W.2d 469, 471 (1971).

See also Sampson v. Commonwealth, Ky., 609 S.W.2d 355, 358

(1980): "The prior knowledge required by an officer [to arrest] is not such as guarantees a conviction...." Petitioner's parenthetical objection to probable cause (see footnote 21, page 24 of the petition) is without legal or factual basis.

The thrust of Petitioner's argument is that his post-arrest confession was obtained in violation of the privilege against self-incrimination and the right to counsel. Petitioner contends that despite the suppression of his confession from evidence, both such constitutional protections were violated because it yielded information used by the police to obtain other incriminating proof. Petitioner claims that all "fruits" of this "poisonous tree"--virtually every item of evidence obtained after his confession was given--likewise should have been suppressed. As the Court will see, however, the suppression of Petitioner's

confession was not constitutionally required. Moreover, the police obtained additional incriminating evidence in spite of Petitioner's misleading confession, not because of it.

Upon taking Petitioner into custody, the arresting officer immediately reminded him of his rights--as had been done earlier when he was questioned without arrest--but further advised that no questions would be asked at such time. (SH I 76; II 232). Enroute to police headquarters, however, Petitioner initiated a conversation in which it was volunteered that he had been acquainted with the murder victim. (SH I 77-78). At this time the only charge for which Petitioner had been arrested was Receiving Stolen Property, i.e., the stolen cigarettes. (SH I 75, 83-84).

When he arrived at the police station, Petitioner signed a written waiver of his rights. (SH II 231-232). Although Petitioner's mother had previously consented to his being picked up for questioning, in light of his written waiver of rights the police failed to notify defense counsel of Petitioner's post-arrest decision to confess. (SH I 85; II 268-270). In his ensuing confession, Petitioner gave the police a false lead by naming Calvin Buchanan as a participant in the crimes instead of David Buchanan. (SH II 233). Petitioner's confession also implicated a participant named "Troy", but he gave no last name or any other means of identifying this accomplice in the crimes. (SH I 44).

Because the police had failed to double-check with Petitioner's mother before obtaining the confession, the

prosecutor would later concede inadmissibility of it on state law grounds⁸ but he argued that no constitutional violation occurred. (TR I 113-114). The trial judge suppressed the confession on both statutory and constitutional grounds, however. (TR I 114-115). Citing Edwards v. Arizona, 451 U.S. 477 (1981), the trial judge considered it improper for police to have "initiate[d]" a post-arrest interrogation since Petitioner had requested and received counsel on the earlier occasion when his non-custodial questioning took place. (Id.)

As it did at trial (TR I 113-114) and on direct appeal to the state supreme court (Appellee Brief, page 59), Kentucky submits that Petitioner's suppressed confession was not obtained in violation of his constitutional rights. Following Petitioner's trial, the Edwards decision on which Judge Leibson relied was clarified in Wyrick v. Fields, 459 U.S. 42 (1982) and Oregon v. Bradshaw, 462 U.S. 1039 (1983), both of which apply to this case by virtue of the new retroactivity rule announced in Griffith v. Kentucky, ____ U.S. ____, 107 S. Ct. 708 (1987). In Wyrick and Bradshaw it was held that a criminal defendant who initiates a conversation with police thereby invites interrogation which may lead to a constitutionally admissible confession, despite his prior assertion of the right to counsel.

⁸/ Petitioner was seventeen years old at the time. When a juvenile is taken into custody on a criminal charge, state law requires parental notification. Ky. Rev. Stat. 208.110; Davidson v. Commonwealth, Ky. App., 613 S.W.2d 431 (1981). Petitioner's mother was notified prior to his pre-arrest questioning of January 13, 1981, and in fact consented to it, but such notice was not renewed when the police arrested him several hours later that same day, after he and defense counsel had left headquarters together.

E.g., "Well, what is going to happen to me now?" 462 U.S. at 1045; the victim from whom the cigarettes were stolen had been a "sweet lady". (SH I 77-78). As for the voluntariness of his ensuing confession, it is fair to say that under the circumstances, Petitioner's will to remain silent most certainly was not undermined by repeated rounds of questioning. Michigan v. Mosley, 423 U.S. 96 (1975). The two interrogations were hours apart, separated by a spontaneous admission that Petitioner knew about the victim, and the confession was given only after learning that the police had gathered a strong case against him. Petitioner's right to remain silent was scrupulously honored and his confession followed an oral warning as well as a written waiver of rights. In short, the trial judge erred by ruling that the Constitution required suppression of Petitioner's confession.⁹

Not only was there no "poisonous tree", there were no "fruits" derived therefrom either. Police solved the case in spite of the misleading information Petitioner gave them, not because of it. United States v. Ceccolini, 435 U.S. 268 (1978). It was Calvin Buchanan who led police to co-defendant David Buchanan and tricked him into incriminating himself during a tape

^{9/} Consistent with the concession it made at trial, however, Kentucky continues to agree that the confession was inadmissible on state law grounds since Petitioner's mother was not notified of his arrest. Davidson v. Commonwealth, *supra*. But while Ky. Rev. Stat. 208.110 affects admissibility of Petitioner's confession, it does not require suppression of any "fruits" derived therefrom. The statute is merely a procedural rule which does not confer any new rights upon a juvenile arrestee. Instead, it only requires parental notification that the juvenile has been taken into custody.

recorded telephone conversation. (SH III 380-381). It was David Buchanan who implicated Troy Johnson, supplying a last name for this co-defendant which Petitioner did not. (SH I 36-38, 65). Petitioner's mother, with the advice of his defense lawyer, consented to the seizure of the gas station keys from her apartment. (SH III 366-372). The only fruit borne of Petitioner's suppressed confession had been a false lead implicating Calvin Buchanan, who did not participate in any of the crimes. (SH II 231-233; TR I 115-116). It neither solved the case nor contributed to probable cause against Petitioner.

In view of all the foregoing, the petition for writ of certiorari should be denied.

VII.

THE INTRODUCTION OF A "SANITIZED" CONFESSION
BY A NON-TESTIFYING CO-DEFENDANT DID NOT
DENY PETITIONER HIS RIGHT TO CONFRONTATION.

In Cruz v. New York, ____ U.S. ____, 107 S.Ct. 1714 (1987) the Court held that the Confrontation Clause bars admission of a non-testifying co-defendant's confession if it facially incriminates the defendant, even though the jury is admonished not to consider such evidence against him.

Decided on the same day as Cruz, the opinion in Richardson v. Marsh, ____ U.S. ____, 107 S.Ct. 1702 (1987) held that the Confrontation Clause is not violated by the introduction of a non-testifying co-defendant's confession if it fails to facially incriminate the defendant, where the jury is instructed to disregard such evidence accordingly in determining his guilt or innocence.

What distinguishes these two cases is that in Cruz, the co-defendant's confession directly implicated the defendant, whereas in Richardson it did not. Consequently, only in Richardson was it realistic to assume that the jury could genuinely adhere to the admonition limiting the effect of the co-defendant's confession:

"There is an important distinction between this case and Bruton¹⁰, which causes it to fall outside the narrow exception we have created. In Bruton, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. (citations omitted). Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." (citations omitted). By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial....Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be

10/ Bruton v. United States, 391 U.S. 123 (1968).

simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule." 107 S.Ct. at 1707-1708.

In the present case, co-defendant Buchanan's confession was "sanitized" so as to remove all references to Petitioner by name. As presented to the jury, Buchanan's confession referred to the existence of an accomplice only as the "other person" or the "other subject." (TE IV 482-486). Therefore the confession of this non-testifying co-defendant, while it alluded to the existence of an accomplice, did not directly or facially implicate Petitioner as a participant in the crimes.

Neither did Buchanan's confession, when "linked" with the other evidence at trial, necessarily incriminate Petitioner by inference. The jurors were well aware that Troy Johnson also participated in this crime spree. Although Johnson testified at the joint trial of Petitioner and Buchanan that he (Johnson) had merely supplied the murder weapon, procured ammunition for it and had driven the getaway car, the jury could have concluded that the "other person" referred to in Buchanan's edited confession was not Petitioner but Johnson instead. For that matter, the jury could have believed that the "other person" was Buchanan's uncle Calvin. As noted on page 4 of the petition, witnesses Amona Dorsey and Kerise Ison initially identified Buchanan's uncle Calvin from a line-up as one of the killers, without positively identifying Petitioner. Uncle Calvin, in fact, was

arrested and charged with the murder until he tricked David Buchanan into admitting his own guilt. See Stanford v. Commonwealth, Ky., 734 S.W.2d 781 (1987) at 783. Indeed, at trial a policeman testified that "Calvin Buchanan had been implicated by [Petitioner] as being the person who had participated...." (TE IV 523), emphasis added. In short, Buchanan's edited confession implicated only himself and an unnamed accomplice who could have been any one of at least three different people even when considered together with "linkage" evidence. Thus, Petitioner was not even indirectly incriminated by Buchanan's confession.¹¹

Petitioner complains to this Court that no limiting admonition was given to the jury, but he fails to explain why it was not done. The reason was that his trial lawyer did not want an instruction limiting the effect of Buchanan's confession. Satisfied that Petitioner would not be referred to by name in Buchanan's confession, defense counsel acknowledged on the record that a limiting instruction could backfire, i.e., actually focus attention on Petitioner. (TE IV 482). After expressing his dissatisfaction with the trial judge's idea of admonishing the

¹¹/ Footnote 5 of the majority opinion in Richardson v. Marsh, supra, has not escaped Kentucky's attention: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." 107 S.Ct. at 1709. Since the "other person" referred to in Buchanan's edited confession could have implicated his uncle Calvin, or Troy Johnson, who admitted at least some participation in the crimes, the confession under consideration here might as well have not even alluded to the existence of any accomplice as far as Petitioner is concerned. Consequently, Kentucky believes that Richardson v. Marsh controls this situation.

jury, defense counsel failed to pursue the matter further. (Id.) Although he never specifically asked that the trial judge refrain from giving the admonition, defense counsel made it clear that he thought such a charge would backfire and, accordingly, failed to ask that it be given. While the Kentucky Supreme Court generally considers unpreserved allegations of errors in capital cases, it has departed from this policy where an omission or non-ruling appears to have been contrived by defense counsel as a matter of trial strategy. See, e.g., Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984). The absence of a limiting instruction in this case obviously resulted from defense counsel's trial strategy. He indicated a belief, on the record, that such a charge would be futile or focus attention on Petitioner. If a criminal defendant can knowingly waive other benefits and considerations--see Buchanan v. Kentucky, supra, at 2921 (Marshall, J., dissenting) concerning "residual doubt"--he surely can do so with respect to a limiting admonition.

Kentucky alternatively argues, as it did before the state supreme court, that any conceivable error in this matter would have been harmless beyond a reasonable doubt considering the spectacular evidence of Petitioner's guilt. In addition to the eyewitness account of participant Troy Johnson (TE VII 1037-1038, 1044) are Petitioner's fingerprints found inside the car where Barbel Poore was executed (TE V 708, 718-719; VII 917),

Petitioner's pubic hairs found on the victim's corpse and clothing (TE VI 804-808), and the gas station keys found on top of Petitioner's dresser (TE IV 473-475).

Beyond the foregoing are Petitioner's own admissions of guilt. He told Alexis Sloan that he had "made a play" for (stole) the boxes of cigarettes from the Cheker gas station. (TE VII 1002-1003). Petitioner told corrections employee Richard Reetzke that he would blow his "mother...brains out" as he had done "just like the girl." (TE VIII 1063). Petitioner bragged to other inmates about the crimes he had committed against Barbel Poore, then laughed when he resumed such boasting to corrections employee Michael Nally. (TE VIII 1076-1078, 1080, 1082). Thus, any possible error would have been harmless. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972).

Accordingly, the petition for writ of certiorari should be denied.

VIII.

THE EIGHTH AMENDMENT DOES NOT LIMIT CRIMINAL PUNISHMENT ON THE BASIS OF AGE ALONE.

On November 9, 1987 the Court heard oral argument of this identical issue in Thompson v. Oklahoma, No. 86-6169, cert. granted ___ U.S. ___, 40 Cr.L.Rptr. 4175 (February 23, 1987). There, Kentucky filed an amici curiae brief on behalf of Oklahoma and 18 other States. For the sake of brevity, Kentucky hereby incorporates those 20 pages of argument rather than repeat them in this brief. Copies of Kentucky's amici curiae brief in Thompson have been served upon counsel for Petitioner in this case.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

C. LLOYD VEST II
ASSISTANT ATTORNEY GENERAL

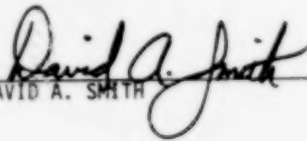
David A. Smith
*DAVID A. SMITH
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494

COUNSEL FOR RESPONDENT

*Counsel of Record

PROOF OF SERVICE

I hereby certify that three (3) copies hereof have been mailed, postage prepaid, to the Honorable Frank W. Heft, Jr., Chief Appellate Defender of the Jefferson District Public Defender, and the Honorable Daniel T. Goyette, Jefferson District Public Defender, both at 200 Civic Plaza, 719 West Jefferson Street, in Louisville, Kentucky 40202, on this the 2 day of January, 1988.



DAVID A. SMITH

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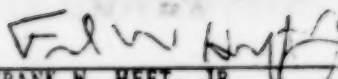
IN THE
SUPREME COURT OF THE UNITED STATES
NO. 87-5765 (4)

Supreme Court, U.S.
FILED
JAN 11 1988
JOSEPH F. SPANIO, JR.
CLERK

KEVIN N. STANFORD,
Petitioner,
v.
COMMONWEALTH OF KENTUCKY,
Respondent.

ORIGINAL

REPLY TO BRIEF IN OPPOSITION


FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 625-3800
COUNSEL FOR PETITIONER


DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I hereby certify that a copy of this Reply was served, by depositing the same in a United States mailbox, with first class postage prepaid, to Hon. David A. Smith, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on January 11, 1988.

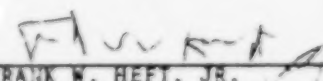

FRANK W. HEFT, JR.
COUNSEL FOR PETITIONER

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REPLY TO BRIEF IN OPPOSITION

Comes the petitioner, Kevin N. Stanford, pursuant to Rule 22.5 of the Rules of this Court, and for his reply to the respondent's brief in opposition, states as follows:

ARGUMENT I

1. THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN A STATE APPELLATE COURT, IN A CAPITAL CASE, ADOPTS A NEW RULE OF ERROR PRESERVATION THAT ADVANCES NO LEGITIMATE STATE INTEREST AND CONSTITUTES A SUBSTANTIAL DEPARTURE FROM PREVIOUSLY WELL-ESTABLISHED RULES GOVERNING PRESERVATION OF ERROR.

APPLICATION OF THIS NEW RULE OF ERROR PRESERVATION TO THE PETITIONER'S CASE VIOLATES DUE PROCESS OF LAW.

The respondent merely views the trial court's action as limiting the number of questions that would be asked during the individual voir dire examination. (Brief in Opposition, p. 7). That view is simply incorrect. The trial court indicated that only one question would be asked during the individual voir dire examination to determine the qualifications of jurors to participate in a capital case. (TE 3-1-82, 10-12; Appendix to Certiorari Petition, hereafter App., 70-72). The trial court indicated that the jury would be "death-qualified" at the completion of the individual voir dire examination. (TE 3-1-82, 22-23). Defense counsel was unequivocally told by the trial judge that the tendered questions which counsel wanted asked to determine the juror's qualifications to participate in the capital case were overruled. (TE I, 39; App., 85).

The respondent attempts to characterize the trial court's action as a mere violation of a Kentucky Rule of Criminal Procedure. (Brief in Opposition, p. 7). A juror's qualifications to participate in a capital case could not be determined solely by responding to the

1. For the purpose of this reply, the petitioner finds no need to address Arguments II, VI and VIII as presented in his Petition for a Writ of Certiorari. Accordingly, the petitioner continues to rely on the arguments made therein as grounds for granting the writ.

single question asked by the trial judge.² Indeed, the single question asked by the trial judge is only a threshold inquiry to determine the juror's ability to serve in a capital case. The question obviously does not address the issue of whether an individual juror would automatically impose the death penalty regardless of the circumstances of a particular case.³ The trial court left no doubt that one and only one question would be asked by which to determine the juror's qualifications to participate in a capital case. Defense counsel's request to have the proposed questions asked was overruled. (TE I, 39; App., 85). The trial court's ruling plainly prevented defense counsel from asking any of the tendered questions regarding the death penalty.

The respondent suggests that defense counsel, by asking some of the questions on his list during the general voir dire examination, construed the Court's ruling as simply being "an allocation of topics between individual and collective voir dire." (Brief in Opposition, p. 8). Thus, the respondent concludes that defense counsel did not view the trial court's ruling as a bar to asking questions during the general voir dire examination concerning the juror's qualifications to participate in a capital case. *The respondent's analysis is fatally flawed. The fact that defense counsel asked the trial judge to incorporate pre-trial publicity in the individual voir dire examination (TE I, 39) and the fact that defense counsel questioned the jurors concerning reasonable doubt and the accused's right not to testify, during the general voir dire examination, has no bearing on the issue at hand. The trial judge, as noted above, unequivocally overruled defense counsel's tendered questions on the issue of capital

2. The question asked by the trial judge was:

"Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstances in this or any other case and regardless of what the evidence may be?"

(TE I, 38, 65-78; TE II, 151-207).

3. The Kentucky Supreme Court recognized that it is proper for defense counsel to attempt to "life-qualify" the jury in a capital case. Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 786 (1987).

punishment. As defense counsel stated "We have tendered proposed questions to the capital phase which I take it are overruled?" The trial judge responded, "Yeah." (TE I, 39; App., 85). Thus, defense counsel's inquiry as to the extent of the trial court's ruling was just as specific as the trial court's ruling. The fact that defense counsel asked questions during the general voir dire about reasonable doubt and the accused's right not to testify is simply irrelevant. The record reflects that the trial court did in fact impose a blanket restriction which precluded defense counsel from asking his proposed questions on the issue of capital punishment. The questions which are at issue here were not asked because of defense counsel's adherence to and compliance with the trial court's unequivocal ruling. Neither the record nor the Kentucky Supreme Court's opinion herein support the conclusion that defense counsel's failure to ask the tendered questions during the general voir dire examination constituted a deliberate trial tactic.

The respondent seeks to avoid the federal constitutional issue by concluding that the ruling of the Kentucky Supreme Court rests on independent state grounds. (Brief in Opposition, p. 9). Yet, the respondent cites nothing in the opinion of the Kentucky Supreme Court to support such a conclusion and indeed concedes that "the opinion does not contain a plain statement that this ruling is based upon Kentucky law . . .". (Brief in Opposition, p. 9). The parameters of the federal constitutional issue involved here are adequately set forth in the petition for a writ of certiorari and the petitioner will not reiterate them here.

The respondent further argues it was a procedural default by defense counsel that led to a denial of the relief sought by the petitioner. (Brief in Opposition, p. 9). Assuming, without conceding, that a procedural default occurred, the petitioner submits that such a default does not prevent vindication of the federal constitutional rights of an accused unless a legitimate state interest is served by the State's insistence on compliance with its procedural rule. Henry v. Mississippi, 379 U.S. 443, 447 (1965). Counsel has a duty to follow and obey the orders and rulings of a court. See

Leibson v. Taylor, Ky., 690 S.W.2d 721 (1986). That is precisely what defense counsel did in this case. The effect of the opinion of the Kentucky Supreme Court was to promulgate a new rule of procedure. As noted in the petition for a writ of certiorari, this rule serves absolutely no legitimate state interest. Therefore, imposition of the death penalty upon the petitioner because of enforcement of this new procedural rule constitutes a denial of due process and is fundamentally unfair.

III. THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY EXCLUDING, DURING THE PENALTY PHASE OF A CAPITAL CASE, MITIGATING EVIDENCE PRESENTED BY A FORMER DEATH ROW INMATE WHO WORKED AS A JUVENILE COUNSELOR AND COULD OFFER TESTIMONY, NOT ONLY ABOUT HIS PERSONAL EXPERIENCE WITH THE PETITIONER PRIOR AND SUBSEQUENT TO THE ALLEGED CRIMES, BUT WHO COULD ALSO TESTIFY ABOUT THE REHABILITATIVE PROGRAMS OFFERED WITHIN THE ADULT PENAL SYSTEM.

It should be noted that the respondent did not argue in its brief filed in the Kentucky Supreme Court that the exclusion of the mitigating evidence offered by Robert Jones was harmless error. (A copy of pp. 60-63 of the respondent's brief in the Kentucky Supreme Court is attached. See A1-4). In its opinion, the Kentucky Supreme Court did not consider whether the error could be harmless. Stanford v. Commonwealth, 734 S.W.2d at 788-790.

The evidence offered by Jones was not cumulative because it came from a very unique prospective that was not shared by any other mitigation witness. As a former death row inmate, Jones could testify from first-hand experience about the security, rehabilitative, educational and vocational opportunities offered by the adult penal system. As noted in the petition for a writ of certiorari, Jones was able to relate that testimony directly to the petitioner with whom he had contact as a youth counselor prior and subsequent to the alleged crimes.

IV. THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A JURY BE INSTRUCTED IN THE PENALTY PHASE OF A CAPITAL CASE THAT THE ACCUSED IS NOT REQUIRED TO TESTIFY AND THAT NO ADVERSE INFERENCE CAN BE DRAWN FROM HIS SILENCE.

Only by reading Kentucky Rule of Criminal Procedure (RCr 9.54(2)) out of context can the respondent reach the conclusion that defense counsel's request for a "no adverse inference" instruction in the penalty phase was not properly presented to the trial judge.

At the time of the petitioner's trial, RCr 9.54(2) provided:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the Court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

In the case at bar, defense counsel complied with the foregoing rule by tendering his proposed instructions to the trial court. (TE X, 1365). A "no adverse inference" instruction was contained in the instructions tendered by defense counsel for the beginning of the penalty phase hearing and for the end of the penalty phase hearing. (A copy of those tendered instructions is attached. See A-6 and A-7). By tendering the aforementioned instructions to the trial judge, defense counsel did all that he was required to do under Kentucky law. Only by misreading the former version of RCr 9.54(2) can the respondent include otherwise.

RCr 9.54(2) was amended effective January 1, 1985. The change in the rule unequivocally demonstrates that defense counsel not only preserved the issue for review in conformance with Kentucky law but also reflects the respondent's misreading of RCr 9.54(2). The present version of said rule provides:

Any party may tender instructions but no party may assign as error the giving or the failure to give an instruction unless he makes specific objections to the giving or the failure to give an instruction before the Court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The former version of RCr 9.54(2) makes it clear that at the time of the petitioner's trial there were three methods by which to preserve

for appellate review an alleged instructional error, i.e. by motion, by tendering instructions, or by making a specific objection. The amended version of RCr 9.54(2) [eff. 1-1-85] makes it clear that the only way to preserve an instructional error for appellate review at the present time is to make a specific objection. Thus, defense counsel at the time of the petitioner's trial fully complied with the demands of Kentucky procedural law and the issue was preserved for appellate review.

The respondent's reliance on Long v. Commonwealth, Ky., 559 S.W.2d 482 (1977) is misplaced. There, the Kentucky Supreme Court held that the defendant's tendered instruction on self-defense was an erroneous statement of Kentucky law. On appeal the defendant argued that the instruction given by the trial court on self-defense was erroneous. However, at trial the defendant merely stated that he objected to the trial court's failure to give his tendered instruction on self-defense. The Kentucky Supreme Court held that the alleged error was not preserved for appellate review under the provisions of that version of RCr 9.54(2) which was in effect at the time of the petitioner's trial. The essence of the Kentucky Supreme Court's decision was that the instructions given by a trial judge cannot be challenged on appeal by a defendant whose own instructions on the subject were an erroneous statement of Kentucky law. That is a far different matter than the situation presented in the case at bar.

As noted above, defense counsel did all that he was required to do under RCr 9.54(2) in order to preserve the issue for appellate review herein. Moreover, the Kentucky Supreme Court never made any finding that defense counsel did not properly preserve this issue for appellate review. Indeed, the Court stated, with regard to issues not addressed in its opinion, that they either "do not warrant detailed discussion" or "are unpersuasive, not because of their argument, but because of their lack of legal substance." Stanford v. Commonwealth, 734 S.W.2d at 792-793. Therefore, there is no merit to the respondent's argument that defense counsel failed to properly preserve this issue for appellate review.

V. THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE JURY BE INSTRUCTED DURING THE PENALTY PHASE OF A CAPITAL CASE THAT THE DEATH SENTENCE NEED NOT BE IMPOSED EVEN IF AN AGGRAVATING CIRCUMSTANCE IS PROVED BEYOND A REASONABLE DOUBT.

The petitioner's discussion of the manner of preservation of error of instructional issues presented in Argument IV above is equally applicable to this argument and is therefore incorporated by reference without further reiteration.

The petitioner submits neither Instruction No. 3 (TR 82CR0406, Vol. III, 311; TE XI, 1407; A-8) nor Instruction No. 4 (TR 82CR0406, Vol. III, 312; TE XI, 1507-1508; A-9) advise the jury that it can find the existence of an aggravating circumstance and still return a verdict other than the death sentence. Instruction No. 3 advised the jury that a sentence other than death could be imposed if the aggravating circumstances outnumbered the mitigating circumstances or if no mitigating circumstances existed.⁴ However, the instruction is fatally flawed insofar as it does not inform the jury that it could impose a sentence other than death even if it found only aggravating circumstances to exist.

Instruction No. 4(a) advises the jury to make no finding on the aggravating circumstances if it has a reasonable doubt as to their existence and Instruction No. 4(b) informs the jury that if it has a reasonable doubt that the petitioner should be sentenced to death then he should be sentenced to imprisonment. Neither instruction can be reasonably construed as informing the jury that a sentence other than death can be imposed even if the aggravating circumstance is proved beyond reasonable doubt. Moreover, the prejudice of the court's failure to give the tendered instruction of defense counsel (App. 60-61) must be examined in conjunction with the very substantial

4. The respondent erroneously phrased the instruction as follows: "[I]f you believe the number of aggravating circumstances are weaker than the number of mitigating circumstances . . ." (Brief in Opposition, p. 24). The correct form of the instruction reads: "[I]f you believe the number of aggravating circumstances are greater than the number of mitigating circumstances . . ." (TR 82CR0406, Vol. III, 311; TE XI, 1507).

prejudice caused by the verdict forms provided to the jury (TR 82CR0406, Vol. III, 314; App. 142). The effect of those verdict forms is to leave the jury no choice but to impose the death penalty if it finds an aggravating circumstance to exist.

VII. THE SIXTH AND FOURTEENTH AMENDMENTS ARE VIOLATED IN A JOINT TRIAL BY THE ADMISSION OF THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT WHICH MAKES REFERENCE TO THE PETITIONER AS "THE OTHER PERSON" AND THE JURY IS NOT ADMONISHED THAT THE STATEMENT CANNOT BE USED AS EVIDENCE OF THE PETITIONER'S GUILT.

Because the words "some other person" were substituted for the petitioner's name when a statement made to a police officer by the non-testifying co-defendant, David Buchanan, was admitted into evidence, the respondent concludes that the confession "while it alluded to the existence of an accomplice, did not directly or facially implicate Petitioner as a participant in the crimes." (Brief in Opposition, p. 33). Such a conclusion defies common sense and reason especially, where as here, the confession is introduced during the joint trial of two co-defendants. Under such circumstances, there simply could have been no doubt in the minds of reasonable jurors as to the identity of "the other person". It is hardly likely that any juror would have considered Troy Johnson to be "the other person" especially in light of the fact that he testified at trial and explained his knowledge of the events in question.

The respondent's assertion that defense counsel believed an admonition regarding the use of Buchanan's statement would backfire by focusing attention on the petitioner is not supported by the record as the following colloquy from the pertinent bench conference indicates (TE IV, 482-483):

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

DEFENSE COUNSEL: We would object on behalf of Kevin Stanford, we would object to anything that David Buchanan said to Detective Hall in the car because that would deny us our right of cross examination.

PROSECUTOR: Judge, I have advised this officer to say blank or another person when they get

to something with his name in it. Now, in order to enforce, per se, why don't we just bring him around and the Court can advise him again.

DEFENSE COUNSEL: That is an accepted way of dealing with it. My problem is that it's easy enough to figure out what's going on from the Jury's view point. I think they know who the blanks are.

THE COURT: Well, I don't know whether they do or not. You're saying they can speculate. I can't deal with speculation. All I can deal with is evidence. I can protect you again by not putting in anything about your client's name, that's why I'd overrule you, but I will caution him if you wish me to, so that he is sure to say some other

DEFENSE COUNSEL: We would at least want you to caution him.

THE COURT: Officer, would you come forward?

DETECTIVE HALL: Yes, sir.

(WHEREUPON, Detective Jerry Hall approached the bench and the following discussion was had out of the hearing of the Jury:)

THE COURT: I just want to caution you about a requirement of Bruton which is, no identification of any other person except David in this statement.

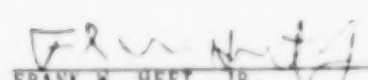
PROSECUTOR: David Buchanan or Troy Johnson.

THE COURT: Say some other person or another person.

As the foregoing excerpt from the trial transcript indicates, defense counsel did not mention anything about an admonition but merely expressed his view that deletion of the petitioner's name and reference to him as some other person would not prevent the jury from determining his identity from the context of Buchanan's statement.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, prays that this Court grant his petition for a writ of certiorari and review the decision of the Kentucky Supreme Court.


FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 525-3800
COUNSEL FOR PETITIONER


DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

XVIII.

THE PROPOSED TESTIMONY OF ROBERT JONES WAS PROPERLY EXCLUDED.

During the penalty phase of the trial, Appellant called Robert Jones to testify. (TE 1483). The Commonwealth objected to his testimony as irrelevant because it was too narrowly focused upon Mr. Jones' experiences while he was on death row. (TE 1485-1486). Defense counsel argued that Jones should be allowed to give his philosophical opinion of whether the death penalty should be rendered, with his knowledge of Appellant. (TE 1485). The trial court tentatively sustained the objection, subject to change after hearing Jones' testimony on avowal (TE 1486-1487).

During this avowal testimony, Mr. Jones noted that he had been associated with four programs which dealt with juveniles (TE 1488). Mr. Jones was also Vice-Chairman of the Kentucky Coalition Against the Death Penalty (TE 1488-1489). From his testimony, it is apparent that his primary function was to gather information concerning the death penalty and to travel around the country speaking out against the death penalty (TE 1489-1490, 1492-1493, 1496). During his avowal testimony, Mr. Jones vocalized his opposition to the death penalty in general, relating this to his personal experience and philosophy and to the philosophies of other speakers, specifically the widow of Martin Luther King (TE 1490, 1492-1497). Mr. Jones testified that he had become acquainted with Appellant while Jones was a youth counsellor at the Children's Center, during 1978 and 1979; however, Jones did not state that he

had talked to Appellant during this period about the offense or about Appellant's history/problems. (TE 1490-1491). Jones did talk to Appellant on at least one occasion during the week prior to trial, at the request of Appellant's attorney. (TE 1491). The superficial nature of this interview is shown by Jones' comment, "... I've heard that Kevin had a drug problem." (TE 1493). In any event, the only testimony by Jones specifically related to Appellant was that, in Jones' opinion, incarceration in an adult institution would be more appropriate because such an institution would provide control and rehabilitation programs (TE 1491-1492, 1494).

At the conclusion of Jones' avowal testimony, the trial court ruled that Jones was not qualified to give his opinion concerning Appellant's chances for rehabilitation and that his testimony was merely cumulative, at best. (TE 1498-1500).

Appellant claims that exclusion of this testimony was error because it precluded him from essential evidence in mitigation. Appellant suggests that the trial court must allow any and all testimony that a defendant labels "mitigating." The Commonwealth would submit that the trial court must have some control over evidentiary matters, even in a capital proceeding. The Commonwealth would further submit that the trial court properly exercised that control by excluding this evidence because the bulk of this testimony was not relevant testimony and the meager portion pertaining specifically to Appellant was cumulative.

Appellant relies to a good degree upon Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, in Lockett, the United States Supreme Court noted, "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 604. The bulk of Jones' proffered testimony consisted simply of his experiences on death row and a philosophical diatribe against the death penalty in general. In a similar situation in Franklin v. State, Ga. 263 S.E.2d 666 (1980), the Georgia court ruled that such testimony is not admissible as evidence in mitigation. Id. at 672-673. The trial court properly excluded this portion of Jones' testimony because it was not relevant to Appellant's character, his prior record, or the circumstances of his offense. Lockett and Franklin, supra.

In Matthews v. Commonwealth, Ky., ___ S.W.2d ___ (Rendered September 27, 1985, Petition for Rehearing Pending), this Court ruled that certain evidence offered in mitigation was properly excluded because it was too remote in time. The Commonwealth would submit that trial courts may also properly exclude evidence offered in mitigation because it is merely cumulative to evidence already received on a certain point(s). As noted earlier, Jones' testimony concerning Appellant specifically was that an adult penal institution would be the more appropriate remedy for him because such an institution provides control and rehabilitative programs. This information had been presented to the jury through earlier

witnesses. Stephen Smith testified about the rehabilitative programs available at adult penal institutions (TE 1379-1381). Dana Mattison, James Berry, Linda Luking and Lloyd Davis testified that Appellant had the potential for rehabilitation (TE 1411-1412, 1425, 1445-1446). Both Ms. Mattison and Ms. Luking indicated that Appellant needed some form of control in his environment (1411-1412, 1439-1443). Finally, Mr. Davis testified that Appellant could be rehabilitated in the penal system (TE 1468). As the Court can see, the minimal amount of Jones' testimony which was relevant was merely cumulative in nature. Weighed against the bulk of his proffered testimony which was not proper for the jury's consideration, this evidence was also properly excluded. Shepherd v. Commonwealth, Ky., 327 S.W.2d 956 (1959).

Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982) is easily distinguished because the evidence excluded in that case was both relevant and was being offered for the first time by that witness.

The judgment should be affirmed.

XIX

ANY PREJUDICE CAUSED BY THE PROSECUTOR'S QUESTION TO GEORGE BOLLER WAS CURED BY THE COURT'S ADMONITION.

During the penalty phase of the trial, Appellant's former step-father was called by the defense (TE 1383-1391). During his testimony, Mr. Boller stated that Appellant had told Boller that he was going to get his life straightened out because his girlfriend was going to have his baby (TE 1389). During cross-examination,

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

PROPOSED INSTRUCTIONS FOR PENALTY PHASE

KEVIN N. STANFORD

DEFENDANT

* * *

INSTRUCTION NO. _____

INSTRUCTION AT BEGINNING OF HEARING

Ladies and gentlemen of the jury, you have tried the defendant and returned a verdict finding him guilty of Murder, _____.

From the evidence placed before you in that trial you are acquainted with the facts and circumstances of the crime itself. You will now receive additional evidence from which you shall determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, following which you shall recommend a sentence for the defendant. In considering such evidence you will bear in mind the same instruction that was given to you in the first stage of this trial proceeding, to the effect that the law presumes the defendant innocent unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty, and you shall apply that same presumption in determining whether there are aggravating circumstances bearing on the question of what punishment should be adjudged against him in this case. You are also instructed that even if you believe that the aggravating circumstances alleged have been proven beyond a reasonable doubt you may still nevertheless in your discretion recommend a sentence other than death. A finding that the aggravating factors

STANFORD

do exist does not mean that you must give the death penalty to Kevin N. Stanford. The question of whether Kevin N. Stanford is put to death is left in your discretion. In order to recommend the death sentence you must believe that at least one of the aggravating factors do exist beyond a reasonable doubt. However, you are not required to make any such specific findings if you return a verdict of punishment of a term of 20 years or more in the penitentiary or for a term of life in the penitentiary. You must consider all the evidence which is presented to you in this hearing. You do not have to make a unanimous finding of fact on any of the evidence unless you are recommending the death penalty in which you must unanimously find that one or more of the aggravating factors have been proven beyond a reasonable doubt and must unanimously agree on that punishment.

As with the trial in chief, the burden of proof herein lies with the prosecutor. The defendant is not required to testify and you cannot hold it against him if he chooses not to testify.

Pursuant to the verdict returned by you finding the defendant guilty of Murder, and under the evidence presented to you in both stages of this trial proceeding you shall recommend to the Court at the conclusion of your deliberations after this hearing one of the following three verdicts:

1. A term of 20 years or more in the penitentiary;
 2. A term of life imprisonment in the penitentiary;
- OR
3. Death by electrocution.

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

DEFENDANT'S PROPOSED INSTRUCTIONS
AT END OF PENALTY PHASE

KEVIN N. STANFORD

DEFENDANT

* * *

INSTRUCTION NO.

REASONABLE DOUBT

If you have a reasonable doubt as to the truth or existence of any one of the aggravating circumstances you shall not make a finding with respect to it. If upon the whole case you have a reasonable doubt as to whether the defendant should be sentenced to death you shall recommend a sentence of imprisonment instead. Even if you believe the aggravating circumstances exist beyond a reasonable doubt you are not bound to return a finding of death. You are free in your discretion to give Kevin Stanford the benefit of life in prison or imprisonment of not less than 20 years in your discretion. A return of a sentence of imprisonment does not require any finding by you concerning any mitigating circumstances but may be made solely in your discretion. You are further instructed that Kevin Stanford is not required to testify in the penalty phase hearing. His election not to testify cannot be construed as having any weight against him, nor shall you consider that fact against him.

INSTRUCTIONS - PAGE 7 -

INSTRUCTION NO. III - AUTHORIZED SENTENCES

You may recommend that the defendant be sentenced (a) to confinement in the penitentiary for a term of twenty (20) years or more; (b) to confinement in the penitentiary for life; or (c) to death, in your discretion, but you cannot recommend that he be sentenced to death unless you are satisfied from the evidence beyond a reasonable doubt that at least one of the statements listed as (a) and (b) in Instruction No. I (Aggravating Circumstances) is true in its entirety, in which event you must designate in writing, signed by the foreman, which of the aggravating circumstances you found beyond a reasonable doubt to be true.

You are further instructed that a sentence of life or term of twenty (20) years imprisonment or more can be returned even if you believe the number of aggravating circumstances are greater than the number of mitigating circumstances, or even if you believe that no mitigating circumstances exist.

INSTRUCTIONS - PAGE 8

INSTRUCTION NO. IV - REASONABLE DOUBT

- (a) If you have a reasonable doubt as to the truth or existence of any one of the "aggravating circumstances" listed in Instruction No. I, you shall not make any finding with respect to it.
- (b) If upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall recommend a sentence of imprisonment instead.

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 87-5765 6

KEVIN W. STANFORD,
Petitioner,
v.
COMMONWEALTH OF KENTUCKY,
Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 525-3800
COUNSEL FOR PETITIONER

Daniel T. Goyette
DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of this supplemental brief was
served, by depositing same in a United States mailbox, with first-
class postage prepaid to Hon. David A. Smith, Assistant Attorney
General, Counsel for Respondent, Capitol Building, Frankfort, Kentucky
80601 on July 29, 1988.

Flw Htj
FRANK W. HEFT, JR.
COUNSEL FOR PETITIONER

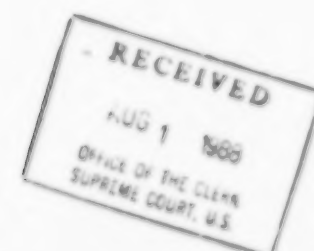


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SUPPLEMENTAL BRIEF FOR PETITIONER

Comes the petitioner, Kevin N. Stanford, pursuant to Rule 22.6 of the rules of this Court, and, in light of the decision announced in Thompson v. Oklahoma, No. 86-6169, ____ U.S. ____, 43 CrL 3197 (Rendered June 29, 1988), hereby files this supplemental brief in support of Question VIII of his petition for a writ of certiorari. In support of this brief, the petitioner presents the following argument.

On November 2, 1987, a petition for a writ of certiorari was filed on behalf of the petitioner. Question VIII of said petition involves the issue of whether imposition of the death penalty on the petitioner, who was 17 years old at the time of the alleged murder, constitutes cruel and unusual punishment in violation of the 8th and 14th Amendments. For the reasons set forth below, the petitioner believes that Thompson v. Oklahoma, *supra* requires his petition for a writ of certiorari be granted and his death sentence be vacated.

ARGUMENT

The murder for which the petitioner was convicted occurred on January 7-8, 1981. He was then 17 years old. At the time of the alleged crime, KRS 208.170(1) which deals with the juvenile court's waiver of jurisdiction and the transfer of an accused juvenile to circuit court for treatment as an adult provided:

If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of the commission of the offense, the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(Emphasis added). That statute was made effective July 15, 1980. See Baldwin's 1980 Kentucky Acts Issue, p. 532. (Appendix, App. 1). The 1980 session of the Kentucky General Assembly also enacted the Kentucky Unified Juvenile Code which was to become effective July 1,

1982. See Baldwin's 1980 Kentucky Acts Issue, pp. xxxvi, 848 and 899. (App. 2). That legislation would have abolished capital punishment for juveniles. See KRS 208F.040(1) which provided:

No youthful offender who has been convicted of a capital offense shall be sentenced to capital punishment, but instead shall be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony.¹

See Baldwin's 1980 Kentucky Acts Issue, p. 899. (App. 2). KRS 208.170 was to be repealed when the new legislation took effect. See KRS 202A.220, Section 152, Baldwin's 1980 Kentucky Acts Issue, pp. 915-916. (App. 3). Thus, at the time of the murder of which the petitioner was convicted, Kentucky had no minimum age for the imposition of capital punishment on juveniles. Indeed, legislation had been proposed abolishing capital punishments for juveniles. However, KRS 208F.040(1) never took effect on July 1, 1982.

The 1982 Session of the Kentucky General Assembly passed legislation that postponed the effective date of the Unified Juvenile Code until July 15, 1984. Baldwin's KRS - 1982 Acts Issue, p. 852. (App. 3). The Kentucky General Assembly, at its 1984 session, repealed the Unified Juvenile Code effective July 13, 1984 (Baldwin's KRS - 1984 Acts Issue, p. 521. (App. 3). Kentucky remained without a minimum age for the imposition of capital punishment on juveniles until September 1, 1987 when KRS 640.040(1) was put into effect. Said statute provided:

No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without the benefit of parole for twenty-five (25) years.

See Baldwin's KRS - 1986 Acts Issue, p. 1098. (App. 4). KRS 208.170 was repealed on September 1, 1987. See Baldwin's KRS - 1986 Acts

1. A Class A felony carried a term of imprisonment of 20 years to life. See KRS 532.060(2)(a). A "youthful offender" was defined as "any person regardless of age, transferred to circuit court under the provisions of this Act." KRS 208A.020(40). Baldwin's 1980 Kentucky Acts Issue, pp. 848, 851. (App. 2).

Issue, pp. 1120-1121. (App. 4). Thus, from January 1, 1975, when KRS 208.170 (App. 4) was first made effective, until September 1, 1987, Kentucky allowed capital punishment to be imposed on juveniles regardless of their age.²

In Thompson v. Oklahoma, supra the plurality concluded "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." ____ U.S. at ____, 43 CrL at 3203. The concurring opinion concluded that Thompson "and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." (O'Connor, J., concurring). Thompson, ____ U.S. at ____, 43 CrL at 3208. Accordingly, there seem to be two prongs to the Thompson analysis. First, the execution of juveniles who were under the age of 16 at the time of their offenses is constitutionally prohibited. Second, capital punishment statutes enacted by state legislatures must prescribe a minimum age at which the commission of a capital offense can result in the perpetrator's execution. An review of past and present Kentucky laws governing the execution of juveniles supports the conclusion that the petitioner's death sentence must be vacated under the rationale of Thompson.

As noted above, from January 1, 1975 until July 1, 1987, Kentucky law did not set a minimum age for the imposition of capital punishment on juveniles. The enactment of KRS 640.040(1) on July 1,

2. At a pretrial hearing on March 1, 1982, the petitioner's counsel brought to the trial court's attention the fact that the 1980 Session of the Kentucky General Assembly had passed KRS 208F.040(1) which abolished capital punishment for juveniles and was scheduled to take effect on July 1, 1982. Consequently, defense counsel argued that the petitioner should not be subjected to the death penalty at his trial. The trial court reserved judgment on the matter pending submission of briefs by the parties. (Transcript of Hearing 3-1-82, 71-82; App. 5-16). Consequently, the defense filed a brief concerning the application of KRS 208F.040(1) to the case at bar. (TR 81CR1218, Vol. 111, 414-416A; App. 17-20). The prosecution also submitted a brief and that part which is pertinent to the application of KRS 208F.040(1) to the petitioner's trial can be found at App. 21; TR 82CR0406, Vol. 1, 21. The case was continued for trial until August, 1982, in order to determine whether KRS 208F.040(1) would take effect. (TR 82CR0406, Vol. 1, 20; App. 22). On June 24, 1982, defense counsel filed a motion requesting that the case proceed as a Class A Felony and that the petitioner not be subjected to the death penalty because the effective date of KRS 208F.040(1) had been extended to July 1, 1984. (TR 82CR0406, Vol. 11, 139-162; App. 23-24). The motion was denied. (Trial Transcript, Vol. 1, 35; App. 28).

1987 does not support the conclusion that the Kentucky General Assembly intended to limit the imposition of the death penalty to juveniles who had attained a minimum age of 16 at the time they committed their offenses. That notion is undercut by the fact that the Kentucky General Assembly proposed legislation [KRS 208F.040(1)] in 1980 that would have abolished capital punishment for juveniles. Although the effective date of that statute was twice postponed and finally repealed in July, 1984, the fact that the Kentucky legislature took action to abolish the death penalty for juveniles suggests that KRS 208.170 cannot be read as implicitly establishing 16 as a minimum age for the imposition of capital punishment on juveniles. Indeed, in 1984 the Kentucky Supreme Court held that it was not a violation of the 8th and 14th Amendments for a juvenile, who was 15 years old at the time he committed a murder, to be sentenced to death. Ice v. Commonwealth, Ky., 667 S.W.2d 671, 679-680 (1984) reversed on other grounds.

The fact of the matter remains that Kentucky did not set a minimum age for the imposition of capital punishment on juveniles until July 1, 1987, long after the crime for which the petitioner was convicted and sentenced to death. Accordingly, the rationale of Thompson v. Oklahoma, supra, requires that the petitioner's death sentence be vacated.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, respectfully submits that Thompson v. Oklahoma, supra controls the disposition of his case. Accordingly, he respectfully requests the Court to grant his petition for a writ of certiorari, vacate the judgment of the Kentucky Supreme Court and remand the case to said court with instructions to enter an order vacating his death sentence under the authority of Thompson v. Oklahoma.

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 625-3800
COUNSEL FOR PETITIONER

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 87-5765

KEVIN N. STANFORD,
Petitioner,
V.
COMMONWEALTH OF KENTUCKY,
Respondent.

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Section 164 KRS 208.170 is amended to read as follows:

(1) If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

(3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

(5) When the juvenile session of district court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile session of district court. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile session of district court.

(b) If an indictment is returned, the court may in its discretion order the case transferred to the juvenile session of district court.

(c) If an indictment is returned and the court does not transfer the case to juvenile session of district court, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

Table 1—KRS Numbers and Headings

Section	Heading (Legislative History)	Page
Chapter 208F Youthful Offenders		
208F.040	Sentencing appropriate for Class A felony (in S. 309, § 19, 7-1-82)	899

CHAPTER 280

(S.B. 309)

AN ACT relating to juveniles.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. KRS CHAPTER 208A IS ESTABLISHED AND A NEW SECTION THEREOF CREATED TO READ AS FOLLOWS:

208A.340 This Act shall be known as the Kentucky Unified Juvenile Code.

SECTION 3. A NEW SECTION OF KRS CHAPTER 208A IS CREATED TO READ AS FOLLOWS:

208A.820 As used in this Act unless the context otherwise requires:

(40) "Youthful offender" means any person regardless of age, transferred to circuit court under the provisions of this Act.

SECTION 99. A NEW SECTION OF KRS CHAPTER 208F IS CREATED TO READ AS FOLLOWS:

208F.040 (1) No youthful offender who has been convicted of a capital offense shall be sentenced to capital punishment, but instead shall be sentenced to a term appropriate for one who has committed a Class A felony.

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from Section 88(2), (3), (4), or (5) of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 98 of this Act.

SECTION 150. A NEW SECTION OF KRS CHAPTER 202A IS CREATED TO READ AS FOLLOWS:

Section 152. The following sections of the Kentucky Revised Statutes are repealed:

208.170 Proceedings against children suspected of felony.

BALDWIN'S KRS — 1982 ACTS ISSUE

852

CHAPTER 284

(S.B. 282)

AN ACT relating to the Kentucky Unified Juvenile Code and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. Acts, 1980, Chapter 280, Section 153 is amended to read as follows:

This Act shall become effective on July 15, 1984 [1-1982].

Section 2. Whereas, 1980 Senate Bill 309 is scheduled to become effective on July 1, 1982, fifteen (15) days before the normal effective date of other legislation passed at the 1982 Regular Session of the General Assembly and would create a conflict therewith, an emergency is declared to exist and this Act shall become effective immediately upon its passage and approval by the Governor.

Approved April 5, 1982

BALDWIN'S KRS—1984 ACTS ISSUE

521

CHAPTER 184

(S.B. 54)

AN ACT relating to the Kentucky Unified Juvenile Code.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

[Eff. 7-13-84]

Section 1. Acts 1980, Chapter 280 and Acts 1982, Chapter 284 are repealed.

Section 2. It is the intent of the General Assembly that the amendments and repealers of Acts 1980, Chapter 280 not become effective and that statutes affected thereby remain as not amended or not repealed, except as affected by legislation other than Acts 1980, Chapter 280 and Acts 1982, Chapter 284 passed during the 1980, 1982, or this Act.

Approved April 3, 1984

SECTION 137. A NEW SECTION OF KRS CHAPTER 640 IS CREATED TO READ AS FOLLOWS:

640.040 Capital punishment and other prohibited dispositions [Eff. 7-1-87]

(1) No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from subsection (2), (3), (4), (5) or (6) of Section 123 of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 129 of this Act.

BALDWIN'S KRS—1986 ACTS ISSUE

1120 - 1121

Section 198. The following KRS sections are repealed:

208.170 Proceedings against children suspected of felony. [Eff. 7-1-87]

208.170 Proceedings against children suspected of felony

(1) If, during the course of any proceeding in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the best interests of the child and of the public require that the child be tried and disposed of under the regular law governing crimes, the court in its discretion may make an order transferring the case to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) When the juvenile court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it may either return an indictment or may return a written report to the circuit court recommending that the child be committed to the department. If the court believes that such commitment would be proper, it may order the child committed to the department.

(b) If, during any stage of the trial in the circuit court, the child or his parent or guardian so requests, the judge in his discretion may stop the trial and commit the child to the department.

(c) If neither of the procedures specified in paragraphs (a) and (b) of this subsection are employed, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

(e) Any commitment to the department under paragraph (a) or (b) of this subsection shall be for an indeterminate period not to exceed the age of twenty-one (21).

HISTORY: 1974 11 232 § 306, eff. 1-1-75

1982 c 212 § 4, 1986 c 157, § 26, 1984 c 193 § 4,

1982 c 161, § 17

MR. JASMIN: Okay, your Honor.

MR. JEWELL: Your Honor, we also tendered a motion dealing with the doctrine of the Workman case which has been upheld twice and later by the Kentucky Supreme Court in which they refused to retreat from this holding both in the Anderson versus Commonwealth and in Priary versus Commonwealth. Also we have the new act of this legislature, which we concede does not go into effect until July of this year, but was passed during the 1980 session which would specifically exempt juveniles from the death penalty by statute. We feel that with this word from this legislature, in addition to the supreme Court holding in Workman addressing the issue of youth and saying that a stringent punishment like life without parole was to deal with only the incorrigible, we feel that death would be similar in that feeling in stating that incorrigibility is inconsistent with youth and they would not make that judgment twice having had the opportunity to have a reprieve from it and twice refusing

to do so, is guidance for this Court in dealing with the law of this Commonwealth.

THE COURT: Let me deal specifically with this other aspect to it. What exactly is the statute that's going to be effective July 1, 1982?

MR. JEWELL: Effective July 1, 1982, Kentucky Chapter 208 will be done away with as we know it now dealing with juveniles. Kentucky will have what will be called the Kentucky Unified Juvenile Code which was passed by the 1980 session under Senate Bill 309, the effective date is July 1, 1982. In this code, 208-P.040 Subsection 1 provides that no youthful . . .

THE COURT: Read that a little bit slowly, please.

MR. JEWELL: Okay. KRS 208-P.040 Subsection 1 will provide that no youthful offender who has been convicted for a capital offense should be sentenced to capital punishment. The new code provides that youthful offenders or any person, regardless of age transferred to the Circuit Court from the Juvenile Court under the

provisions of the new unified code. I would cite 208-A.020 Subsection 4 and Juvenile Court would have jurisdiction, like they do now, of any person who commits a crime who is under 18. 208-A.0301. Therefore, any person who commits, for example, capital murder, when they're under the age of 18 . . .

THE COURT: Can I see that statute?

MR. JEWELL: I'm going to have to send a copy of it to you, Judge. I don't have a copy of it with me.

THE COURT: I know you referred to it in your brief, but I need to see it. Well, you can back after lunch, I'm going to have to break for lunch and a motion hour anyhow at about noon.

MR. JEWELL: Okay, your Honor, if we could bring the statute itself over at that time. It is printed in the new statute after the 1980 session with the warning on it that it's not effective until July 1, 1982.

THE COURT: All right, what would be the effect that this case was

tried after July 1, 1982?

MR. JEWELL: If this case was tried after July 1, 1982, your Honor, I would think . . .

THE COURT: Is there a procedural statute that would be effective to this case?

MR. JEWELL: I believe there would be, your Honor, I think it would be procedural as to how we proceed up here, and how effective the trial would be, and I believe that it would be effective for this trial if this trial was set, say, July 2nd.

MR. JASMIN: Has counsel concluded?

MR. JEWELL: I have concluded with that.

MR. JASMIN: The Commonwealth's position with reference to retroactive application of the statute based upon 445.083 and it specifically says no statute shall be construed to be retroactive unless it's expressly so declared. Now, in 218-F, is that expressly declared that it would be applied retroactively?

THE COURT: The problem is what's the definition of what's retro-active and what's not. Procedural statutes usually apply, not based on the time of the occurrence, but on the time of the procedure. If this is a procedural statute, then it seems to me that it would apply to any case tried after July 1, 1982.

MR. JASMIN: Well, the Commonwealth's position is, that we don't have to worry about whether it's procedural or not if it's a statute, because another statute specifically says that a statute cannot be construed retroactively and it doesn't specify . . .

THE COURT: Shall we dance around that pole again? The question is not whether statute should apply retroactively, the question is whether or not this is a procedural statute. A procedural statute does not apply retroactively, but it applies to the procedure ahead of it.

MR. JASMIN: I would agree with that, Judge. All I'm saying, is 446.580, regardless of the date says regardless

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to the debate of procedure or substance says that unless the statute specifically indicates it is to be applied retroactively, it shall not be applied retroactively under Subsection 3.

THE COURT: Well, that doesn't answer my question, the question in my mind, Mr. Jasmin.

MR. JASMIN: Well, Judge, all the Commonwealth is saying is that there is nothing in the statute which talks in terms on how statutes are applied and they are talking about 218-F.

THE COURT: Do you agree that offenses committed by juveniles after July 1 of 1982, the death penalty would have no application?

MR. JASMIN: No, I would not agree to that as of this point, Judge, because there is some questions as to whether or not the situation is going to pass or going to go into effect.

MR. HECTUS: It's already passed.

MR. JASMIN: I know

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that it's already passed. But, the person sponsoring is now in state legislature moving to knock it out.

THE COURT: It's already a law, you're saying it could be repealed.

MR. JASMIN: No. What I'm saying is, is that it is not a law which can be applied until June. What I'm suggesting to this Court is that it's not in effect now and its sponsor, Maloney from Lexington, is moving currently that it be repealed.

MR. HECTUS: Your Honor, in my brief I did not cite the statute and I would like to adopt that part of Mr. Jewell's motion as to the statutory construction problem and furthermore.

THE COURT: I'm going to reserve judgment on that and take that under consideration. It seems to me this case ought not to turn on whether the case is tried before or after July 1, 1982. I'm more concerned about whether the statute, if it were being tried after July 1, 1982, would apply to this case or not.

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MR. JEWELL: Could we address that after lunch?

MR. HECTUS: Judge, I would like to submit a brief on that, I'm not prepared to argue it today.

MR. JASMIN: Judge, the Commonwealth is also going to request an opportunity to do some extensive researching.

THE COURT: I think that that's a very serious point and it needs to be taken care of, probably separately addressed on a different day than today.

MR. JEWELL: I'll go along with that.

THE COURT: I don't, frankly, I don't anticipate that, you know, that if the . . . if there is a reasonable probability that this statute could have application if the case was tried after July 1, 1982, that you fellows would want to move for a continuance.

MR. JEWELL: I'll be moving for a continuance today.

MR. JASMIN: Your Honor, so that we understand . . . so that I under-

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stand what the Court is referring to, you are overruling the motion with reference to the death penalty until, but you want to look at 208-F, is that correct, and the anticipated statute which will come effective on July 1st?

THE COURT: I think that, Mr. Jasmin, is substantially correct. I'm not going to rule that the death penalty in an aggravated circumstance, if it's proved, is cruel punishment; nor am I going to rule it's cruel punishment because it's applied to a 16 or 17-year-old as opposed to an 18-year-old.

MR. HECTUS: So you're distinguishing Workman and we'll read the statute, then?

THE COURT: Because I am concerned about whether . . . I'm going to reserve judgment on that one issue, and that's the one that bothered me the most when I was reading this material last night. It doesn't seem to me that the death penalty ought to turn on anything as gratuitous as whether this case is tried in March or July.

if such is the case.

MR. JASMIN: To clear the record then, you're saying the memorandum supplied by counsel for Buchanan, and where he says motion memorandum to exclude death penalty due to insufficient statutory guidance, that's been overruled, is that correct?

THE COURT: I'm overruling all of these motions relating to foreclosing the death penalty except the motion which is directed to the arbitrary and capricious nature of its application in this case because of or the possible arbitration as it applies in this case, because of the statute 208-F.02 Subsection 1. I'm going to reserve judgment on that and I think you'd better response to that.

MR. JASMIN: I will, Judge.

MR. HECTUS: Judge, do you want to give us a date by which we will submit our memorandums?

THE COURT: You've made your motion. It's just a question of his responding. All I really need from you all . . .

well, I would like both sides to respond by next Monday to give me whatever they're going to give me on whether this, you know, whether this should be considered . . . I don't want this to get hung up in legalism about retroactive or prospective application because if the statute is procedural, it means it applies at the time of this procedure, that the procedure is enacted. If the statute is substantive, and this relates to rights which exist, then those are fixed by what happens at the time of the offense. I would think that a penalty provision is substantive, but I would like to hear about that.

MR. JEWELL: Okay, we will . . .

THE COURT: I think there is some law that a penalty provision is substantive.

MR. HECTUS: Your Honor, 4.6 also addresses the penalty section that Mr. Jasmin didn't cite, and I think it has something to do with sentencing at the time of that new statute, whether or not it allows the defendant or the Court to set sentence

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under a new statute as opposed to the old statute. It's not in the criminal law . . .

MR. JEWELL: What was that?

MR. HECTUS: 440.080.

MR. JASMIN: 440.080

does not cover it.

THE COURT: Well, he says there's more in that statute. Well, anyhow, we're clear about that. I'm going to definitely consider that, and I want you all to submit it at the motion hour next Monday. I want you all to have anything that you want to submit by next Monday at the motion hour. I will try to hear you after the motion hour.

MR. JEWELL: Okay, thank you, your Honor.

THE COURT: All right. That takes care of all of those motions related to excluding the death penalty. Now, what about the motion to transfer back to Juvenile Court?

MR. JEWELL: I have a motion, Judge, to that on behalf of Kevin

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NO. 81CR1218

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

NOTICE - BRIEF

KEVIN N. STANFORD

DEFENDANT

* * *

NOTICE

TO: Hon. Ernest Jasmin
Assistant Commonwealth's Attorney
600 Legal Arts Bldg.
Louisville, Kentucky 40202

The following will be presented at motion hour in Division 9,
March 8, 1982 at 12:30 p.m. per previous order of the court.

BRIEF PERTAINING TO APPLICATION OF
DEATH PENALTY FOR JUVENILE CRIMES
AFTER JULY 1ST

ISSUE ADDRESSED

Whether KRS 208F.040, effective July 1, 1982, would apply to
this case should it be tried after July 1982?

ARGUMENT

That application of KRS 208F.040, after its effective date to
the present case would not violate the protection from ex post facto
laws as it is procedural in nature, and, in fact, the defendant, under
Kentucky statutory law, can consent to the use of new law which miti-
gates punishment.

The 1980 session of the Kentucky General Assembly passed into
law the Kentucky Unified Juvenile Code but did not make this Code ef-
fective until July 1, 1982. Under this Code KRS 208F.040(1) provides

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that no youthful offender convicted of a capital offense shall be
sentenced to capital punishment but shall be sentenced for a Class A
felony. A youthful offender, in the new Code, is defined as "any
person regardless of age, transferred to circuit court under the pro-
visions of KRS Chapters 208A to 208G. KRS 208A.020(40).

If the defendant was to be tried after July, 1982, the pro-
vision excluding the death penalty would be applicable to him. The
protection against ex post facto laws is designed to be a limit on
matters of remedies and procedures. See Dobbert v. Florida, 432 U.S.
282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) citing Beazell v. Ohio, 269
U.S. 167 46 S.Ct. 68, 70 L.Ed 216; and Malloy v. South Carolina 237
U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905. A procedural change is not ex
post facto. The new law in the instant case is a juvenile code gov-
erning procedure and jurisdiction. There is no amendment to the law
the defendant is charged with violating. The elements will remain the
same for all substantive offenses and the only change will be in how
the defendant is proceeded against.

In Dobbert v. Florida, supra, the petitioner committed a capital
offense while the statute providing for the death penalty in effect at
the time was constitutionally infirm. After that law was struck down,
but before the trial of the petitioner, a new death penalty law was en-
acted. The Supreme Court held that the petitioner was subject to the
new law even though it was passed after the time of his alleged crimes.
The Court held that the enactment of a new death penalty procedure was
merely a procedural change and not an ex post facto law. In the case
of Kevin Stanford, KRS 208F.040 was actually passed by the legislature
prior to his alleged crime and only to effective date post-poned. If

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Stanford's trial was held after the effective date, KRS 208F.040 would certainly apply at trial under the authority of Dobbert v. Florida.

It was also held in Dobbert v. Florida, supra, that in order to be ex post facto, it was axiomatic that a new law had to be more onerous than the sentence of death. KRS 446.110 states "...If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." This sentence out of KRS 446.110 is exactly the same language contained in the prior Kentucky Statutes section 465. It was held under that statute that the defendant could obtain the benefit of a lesser punishment under a law enacted after the date of his offense if the new law definitely mitigated the allowable punishment and the defendant consented to judgment being pronounced under the new law. Coleman v. Commonwealth, 160 Ky. 87, 169 S.W. 595 (1914) and Earl v. Commonwealth, 202 Ky. 726, 261 S.W. 239 (1924). In the present case the new procedures of KRS 208F.040 definitely mitigates Stanford's punishment by reducing maximum punishment from death to life in prison. The consent of the defendant to the Court applying KRS 208F.040 is evident and obvious from the pleadings.

For the reasons stated above, it is clear that if this trial were to be held after the effective date of KRS 208F.040, the new law would apply both as a procedural change and as consented to by the defendant under KRS 446.110.

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CERTIFICATE

This is to certify that a copy of the foregoing motion was delivered to the Hon. Ernest Jasmin, Assistant Commonwealth's Attorney, or his agent, on this the ____ day of March, 1982.

FRANKLIN F. JEWELL
CHIEF TRIAL ATTORNEY
Office of the Jefferson District
Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800

JAMES M. SHAKE
ASSISTANT DISTRICT DEFENDER
Office of the Jefferson District
Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800

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NO. 81CR1218

FILED IN COURT

JEFFERSON CIRCUIT COURT

MAR 15 1982

NINTH DIVISION

COMMONWEALTH OF KENTUCKY

PAULIE MILLER, Clerk

PLAINTIFF

VS.

RESPONSE TO BRIEF PERTAINING TO
APPLICATION OF DEATH PENALTY FOR JUVENILE CRIMES

KEVIN STANFORD
DAVID BUCHANAN

DEFENDANTS

ARGUMENT

1. That the application of K.R.S. 208F.040, after the effective date, to the present case under the current case law could be applied if said case is tried after its effective date. However, it would appear that 208F will not go into effect on July 1, 1982, in that Senate Bill 282, which repeals the juvenile court (208F) was passed by the Senate on February 26 and is currently in the House Judiciary Criminal Committee.

2. The application of Workman v. Commonwealth, 429 S.W. 2d 374, has precedence in the current case. In Workman the issues involved conviction of a fourteen year old defendant of forcible rape which was the only charge under Kentucky Revised Statutes which permitted the punishment of life without parole. In the current application of juvenile law, fourteen year olds cannot even be waived to the grand jury for treatment as adults and the provision in our criminal code which allowed conviction and a sentence of life without parole on a rape charge has been abolished. Based upon that case, the defendants argue that the imposition of the death penalty on a juvenile is cruel and unusual punishment.

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NO. 81CR1218

JEFFERSON CIRCUIT COURT

NINTH DIVISION

COMMONWEALTH OF KENTUCKY

PLAINTIFF

-VS-

ORDER

Stanford & Buchanan

DEFENDANT

Comes the Defendant and the Commonwealth and moves the Court to continue this case and as grounds therefore, states as follows: By agreement case is reassigned to the date set out below, due to a decision pending in the legislative regarding the death penalty of juveniles.

Defence is not ready due to an exam. of the defendants.

Defendants to report back in one week regarding the progress of the exam.

ENTERED IN COURT.

MAR 15 1982

PAULIE MILLER, Clerk
By Franklin P. Jewell Deputy Clerk

Commonwealth Attorney

Thomas Hecht
Defense Attorney

The Court being sufficiently advised, this case is continued to the 02 day of July, 1982, for trial.

Charles W. Leibson
CHARLES W. LEIBSON, JUDGE

DATED: _____

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NO. 82CR0406

COMMONWEALTH OF KENTUCKY

VS.

KEVIN N. STANFORD

FILED JUNE 24 11 42 AM '82 JEFFERSON CIRCUIT COURT

DIVISION NINE

PLAINTIFF

DEFENDANT

NOTICE-MOTION-ORDER

NOTICE

TO: HON. ERNEST JASMIN
ASSISTANT COMMONWEALTH ATTORNEY
600 LEGAL ARTS BLDG.
LOUISVILLE, KY. 40202

Please take notice that the following motion will be made on the 28th day of June, 1982 in Division Nine, at the regularly scheduled motion hour at 12:30 P.M.

MOTION TO PROCEED AS CLASS A FELONY

Comes the defendant, by counsel, and moves this Court to enter an order that the above-styled indictment shall be tried as a Class A Felony as opposed to a capital offense. In support of this motion, the defendant notes the following:

1. Defendant, by counsel, has previously filed with this Court on or about February 25, 1982 a motion to exclude death as a possible penalty along with a memorandum in support of defendant's motion to exclude the death penalty, and on or about March 5, 1982 the brief pertaining to application of death penalty for juvenile crimes after July 1, 1982.

2. In ruling on these motions, the Court ruled that

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because of the passage of KRS 208F.040 with an effective date of July 1, 1982, the above-styled action could not be tried as a capital case if, in fact, KRS 208F.040 went into effect July 1, 1982.

3. The Court expressed reservations about ruling on the defendant's motion to exclude the death penalty based on the defendant's argument under Kentucky case law, specifically the case of Workman v. Commonwealth, Ky. 429 S.W.2d 374 (1968) and subsequent cases because the Court felt it would be presumptuous for it to rule on a constitutional issue at the time the motion was made.

4. KRS 208F.040, as well as the entire Kentucky Unified Juvenile Code, was given a new effective date by this session of the Kentucky General Assembly. The new effective date of the Kentucky Unified Juvenile Code including KRS208F.040, which would not allow the death penalty for any person who commits a crime under the age of 18, is July 1, 1984.

5. This new effective date was given because of financial difficulty with the implementation of the entire code.

6. Under the most recent case of Smith v. Commonwealth, KY., ___ S.W.2d ___ (29 KLS 7, p. 14, 1982), the Court has the power in any capital case to relieve the jury of any consideration of the death penalty. In that case, the Court would not allow the case to go into a penalty phase, even though the Commonwealth was seeking the death penalty, because the Court reasoned that it would be unconstitutional to give a "nontrigger man" the death penalty since the "trigger man" had received the minimum sentence of twenty years.

7. Since it now appears certain that a trial court may refuse to allow a case to be tried as a capital case, even

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though the Commonwealth claims aggravating circumstances, if the Court finds that the penalty would be disproportionate or that the penalty would be infirm in some other way, the defendant respectfully asks this Court to reconsider the merits of the defendant's arguments based upon the case law under Workman v. Commonwealth, supra, and subsequent cases and based upon the fact that the Kentucky General Assembly is consistent in making its desires known that KRS 208F.040, which would exclude the death penalty to those committing crimes under the age of 18, shall become law of this Commonwealth within two years from the date that the above-styled action is set for trial. The defendant's position has been clearly stated in detail and its prior motion to exclude death penalty as possible punishment, its prior memorandum in support of defendant's motion to exclude the death penalty, and its prior brief pertaining to application of death penalty for juvenile crimes up to July 1, 1982.

WHEREFORE, relying on arguments previously stated to this Court, the defendant moves this Court under its discretionary power to relieve the jury of any consideration of the death penalty to proceed with this case as a Class A felony for which punishment for the charge of Murder would be 20 years to life.

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CERTIFICATE

This is to certify that a copy of the foregoing motion was delivered to the Hon. Ernest Jasmin, Assistant Commonwealth Attorney, or his agent, on this the 24th day of June, 1982.

Franklin P. Jewell
FRANKLIN P. JEWELL
CHIEF TRIAL ATTORNEY
Office of the Jefferson District
Public Defender
200 Civic Plaza
701 W. Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800

JMS
JAMES M. SHAKE
ASSISTANT COMMONWEALTH ATTORNEY
Office of the Jefferson District
Public Defender
200 Civic Plaza
701 W. Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800

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NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

O R D E R

KEVIN N. STANFORD

DEFENDANT

* * * *

Motion having been made and the Court being
sufficiently advised,

IT IS HEREBY ORDERED that the above-styled Indictment
shall not be tried as a capital offense, but that the penalty
for the charge of Murder shall be that of a Class A felony from
20 years to life.

HON. CHARLES LEIBSON, JUDGE
JEFFERSON CIRCUIT COURT

DATE ENTERED

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MR. JEWELL: We also have one
motion which the Court have under submission to exclude the
death penalty based on the defendant's age which has not
been finally ruled on.

THE COURT: I thought I had
ruled on that.

MR. JEWELL: You remember
you want to wait to see if the law is repealed.

THE COURT: You're right, I
told you how I was going to rule on it.

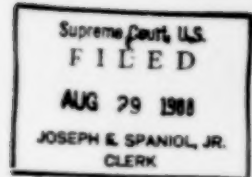
MR. JEWELL: And, now the law
was merely delayed, so I filed a follow-up motion to
that back in June and the Court took it under submission.

THE COURT: My position is
that when the legislature moved that to 1984, that will
be delayed then, too, in my opinion. So, you're overruled
on that, too, the case will be tried as a capital case.

MR. HECTUS: I had, at one
time, filed a motion for separate juries for the guilt or
innocent portion of the trial and the penalty phase of
the trial. Of course, the basis of my motion was that
a death qualified jury is prosecution prone according to
studies that I appended to my motion and I would like
to renew my motion because I now have a client that's
not even subject to the death penalty but is going to be
tried by a death qualified jury.

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NO. 87-5765



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

KEVIN H. STANFORD

PETITIONER

versus

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO
SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

FREDERIC J. COWAN
ATTORNEY GENERAL OF KENTUCKY

C. LLOYD VEST II
ASSISTANT ATTORNEY GENERAL

*DAVID A. SMITH
ASSISTANT ATTORNEY GENERAL
SUITE 34, CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600

COUNSEL FOR RESPONDENT

*Counsel of Record

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NO. 87-5765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

KEVIN N. STANFORD

PETITIONER

versus

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO
SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

This is a capital case in which the petition for writ of certiorari was filed November 2, 1987. Among the questions presented therein is whether or not the Eighth Amendment exempts from capital punishment a 17 year old murderer, such as the petitioner, by reason of his age.

After Kentucky filed its brief in opposition to Stanford's petition, the Court held in Thompson v. Oklahoma, 56 U.S. Law Week 4892 (June 29, 1988) (plurality decision) that 15 year old murderers are so exempted.

On the day after Thompson was announced, the Court granted certiorari in a tandem of cases to consider whether or not 16 and 17 year old murderers should likewise be exempted from

capital punishment. High v. Zant, 87-5666 (11th Cir. Ga., 619 F.2d 988) and Wilkins v. Missouri, 87-6026 (Mo. S.Ct. 736 S.W.2d 410).

Stanford then filed the supplemental petition to which this brief in opposition is addressed. Kentucky has agreed to file a combined amici curiae brief for Georgia and Missouri in High v. Zant and Wilkins v. Missouri, which should be incorporated here. In the meantime, Kentucky additionally submits the following abbreviated response because this is a capital case.

ARGUMENT

In Thompson v. Oklahoma, supra, a four-Justice plurality ruled that the execution of a 15 year old murderer would constitute cruel and unusual punishment for essentially two reasons. First, it was observed that many death penalty States had enacted legislation limiting such punishment on the basis of age. All the death penalty States having a minimum age requirement had set a limit of at least 16 years. Adding those States together with the ones which do not authorize capital punishment under any circumstances, the plurality Opinion found a national consensus that murderers under the age of 16 years should not be sentenced to death. Further evidence of this consensus was found to exist among the resolutions of respected professional organizations such as the American Bar Association, and the laws of other civilized countries such as the Soviet Union. (Slip Opinion at 13).

Beyond the foregoing indicia of a national consensus was the rarity of jury verdicts sentencing 15 year old murderers to death. The infrequency of such executions led the plurality to conclude that the practice was intolerably cruel and unusual. (Slip Opinion at 14-16).

It is because the plurality confined its Opinion to the below-16 age group^{1/} that the 17 year old petitioner here relies upon the one-Justice concurrence. The latter Opinion declined to infer a national consensus on the matter, noting that the federal government as well as 19 States apparently authorize capital punishment of persons under 16 years of age. Although the concurring Opinion acknowledged the probability that such a consensus exists, its holding was based instead on the failure of those jurisdictions to have specified whether a minimum age was intended or at least had been contemplated. Thus, there was a "considerable risk" that Oklahoma had not actually intended that murderers of this age group be eligible for capital punishment. - Absent any indication that the Oklahoma legislature had considered this particular consequence, its death penalty statute was impermissibly ambiguous in comparison with those of other States having an express age limit. (Slip Opinion at 10).

Stanford points out that prior to the commission of his crimes, Kentucky's legislature enacted a new juvenile code which was repealed before it ever took effect. Among the provisions of that new code would have been an age limit of 18 for capital punishment. Because it never became law, however, Stanford was sentenced under a statute which set no age limit for capital punishment. Only after Stanford's trial did Kentucky give effect to a statute specifying a minimum age for capital punishment. That minimum age is 16 years. KRS 640.040(1).

1/. "[Thompson's] counsel and various amici curiae have asked us to 'draw a line' that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." (Slip Opinion at 21).

Stanford's supplemental petition urges that his sentence must be vacated because his trial preceded an effective statute limiting capital punishment on the basis of age. Since the plurality in Thompson v. Oklahoma, supra did not reach the question regarding Stanford's age group, he relies primarily upon the concern expressed by the concurring Opinion, i.e., that a juvenile would be sentenced to death without the State having indicated it had at least considered a minimum age. The problem with Stanford's argument, however, is that prior to the crimes for which he was tried the Kentucky legislature had undeniably considered the reach of its death penalty statute.

Consequently, neither the plurality nor the concurrence in Thompson is supportive of Stanford's argument. His death sentence cannot be ascribed to inadvertence by the Kentucky legislature, and the question concerning this age group was expressly left open in Thompson.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied.

Respectfully submitted,

FREDERIC J. COWAN
ATTORNEY GENERAL

C. LLOYD VEST II
ASSISTANT ATTORNEY GENERAL

David A. Smith
*DAVID A. SMITH
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494

COUNSEL FOR RESPONDENT

*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the Respondent's Brief in Opposition to Supplemental Petition for Writ of Certiorari have been mailed, U.S. Postage prepaid, to Hon. Frank W. Heft, Jr., Chief Appellate Defender and Hon. Daniel T. Goyette, Jefferson District Public Defender, 200 Civic Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202 on this the 26th day of August, 1988.


Assistant Attorney General

No. 87-5765

FILED
NOV 18 1988
JOSEPH E. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

KEVIN N. STANFORD,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY**

JOINT APPENDIX

FRANK W. HEFT, JR.*
Jefferson District Public
Defender's Office
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800
Counsel for Petitioner

*Counsel of Record

DAVID A. SMITH*
Assistant Attorney General
of Kentucky
Capitol Building
Suite 34
Frankfort, Kentucky 40601
(502) 564-7600
Counsel for Respondent

**PETITION FOR CERTIORARI
FILED NOVEMBER 2, 1987
CERTIORARI GRANTED OCTOBER 11, 1988**

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October 28, 1981 – Jefferson District Court, Juvenile Division, transfers jurisdiction of petitioner's case, pursuant to KRS 208.170, to Jefferson Circuit Court.

November 5, 1981 – Jefferson County Grand Jury returns Indictment No. 81CR1218 charging petitioner with capital murder, first degree robbery, first degree sodomy, and receiving stolen property over \$100.

March 1, 1982 – Jefferson Circuit Court, Ninth Division, overrules petitioner's motion to transfer his case back to Jefferson District Court, Juvenile Division.

March 4, 1982 – Jefferson County Grand Jury returns Indictment No. 82CR0406 and petitioner is reindicted on charges of capital murder, first degree robbery, first degree sodomy, and receiving stolen property over \$100.

August 2-13, 1982 – Petitioner is tried by a jury in Jefferson Circuit Court, Ninth Division. Jury finds petitioner guilty of capital murder, first degree robbery, first degree sodomy, and receiving stolen property over \$100. Jury recommends death sentence on murder conviction and recommends maximum sentences of twenty (20) years, twenty (20) years, and five (5) years on the convictions for first degree robbery, first degree sodomy, and receiving stolen property over \$100, respectively.

September 28, 1982 – Final judgment is entered by the Jefferson Circuit Court, Ninth Division, petitioner is sentenced to death on the conviction for murder and is sentenced to twenty (20) years imprisonment on the first degree robbery conviction, twenty (20) years imprisonment on the first degree sodomy conviction, and five (5)

years imprisonment on the receiving stolen property over \$100 conviction. The latter sentences are run consecutively.

April 30, 1987 – Kentucky Supreme Court renders Opinion in *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781 (1987) affirming judgment of conviction and sentences imposed on petitioner.

September 3, 1987 – Kentucky Supreme Court enters order denying petitioner's petition for rehearing and granting his petition for modification of opinion.

November 2, 1987 – Petition for a writ of certiorari is filed in United States Supreme Court.

October 11, 1988 – United States Supreme Court enters order allowing petitioner to proceed in forma pauperis and granting his petition for a writ of certiorari.

October 17, 1988 – United States Supreme Court enters amended order limiting grant of certiorari to Question VIII as presented in the petition for a writ of certiorari.

NO. ____

JEFFERSON DISTRICT COURT
JUVENILE DIVISION

IN THE INTEREST OF:

KEVIN STANFORD, A CHILD

MOTION TO DECLARE KRS 208.170
UNCONSTITUTIONAL IN ITS APPLICATION

Comes the child, by counsel, under the United States Constitution, Amendments 8 and 14, and the Constitution of Kentucky, sections 17, 27, 28, and 109, and moves this court to declare KRS 208.170 unconstitutional as applied. In support of such motion, the child notes the following:

1. The child is presently facing a transfer hearing under KRS 208.170 on charges of Murder, Sodomy, Robbery, and Receiving Stolen Property;
2. The transfer hearing is being held pursuant to a motion to transfer jurisdiction made by the Assistant County Attorney;
3. The court has previously found probable cause on the above mentioned charges after a hearing as required under KRS 208.170;
4. KRS 208.170 gives exclusive authority to the juvenile court to initiate waiver proceedings thus making it a judicial function;
5. Local practice in the Jefferson District Court has been for waiver hearings to be set upon a motion by an assistant county attorney
6. The abdication of such judicial authority as granted under KRS 208.170 to the executive branch of

government violates the separation of powers doctrine required under the Kentucky Constitution, sections 27, 28 and 109 which vest exclusive jurisdiction of judicial matters within the judiciary branch of government;

7. This type of encroachment into judicial affairs cannot be constitutionally tolerated. See *California v. Federal Power Commission*, 369 U.S. 482, 82 S.Ct. 901 (1962); *Green v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959); *Kentucky v. Dennison*, 65 U.S. 66, 10 L.Ed. 717 (1800); *Commonwealth v. Schumacher*; Ky. App., 566 S.W.2d 702 (1978); and *Frazee v. Citizens Fidelity Bank and Trust Company*, Ky. 393 S.W.2d 778 (1965).

8. The executive branch is not vested with the power to make judgmental decisions affecting the rights and liberty of individuals. See *Green v. McElroy*, *supra*; and *Bradshaw v. Bell*, Ky., 487 S.W.2d 294 (1972).

9. The improper execution of KRS 208.170 violates both the equal protection and due process clause of the 14th Amendment of the United States Constitution since it allows the executive branch to selectively prosecute cases for waiver instead of properly allowing the judicial branch to make the initial judgment on which cases should be subject to a waiver hearing.

10. The latitude (sic) given to the juvenile session of District Court in waiver proceedings assumes that the procedures used satisfy the basic requirements of due process and fairness and does not give the court the right to use arbitrary procedures. *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966);

11. The procedures currently in use in the Jefferson District Court in following KRS 208.170 result in discrimination against the poor and the black;

12. The discriminatory application of KRS 208.170, and, in fact, the entire application of juvenile justice, can be seen by the disproportionate number of black children waived to the Grand Jury for homicide (sic) cases, the disproportionate percentage (sic) of black children institutionalized, and the extreme difference in the percentage of cases involving white children that are handled informally as compared to the percentage of cases involving black children that are handled informally;

13. KRS 208.170 further violates the 8th and 14th Amendments to the United States Constitution and section 17 of the Kentucky Constitution as it is applied, in that its enforcement is imposed only in selectively few cases which results in an arbitrary and discriminatory infliction of punishment on recognizable minorities. See *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972), opinions of Justices Douglas, Brennan, White, Marshall, and Stewart;

14. Evidence of discrimination in the transfer of juveniles to the circuit court, supported by evidence of discrimination in other areas of discretion in the juvenile justice system, demonstrate the violations of the 8th and 14th Amendments in that certain classes of individuals, namely the black and the poor, are more likely to receive harsher and more severe treatment than those persons outside of their class;

15. Any law, even if it is non-discriminatory on its face, may be applied in such a way to violate the equal

protection guarantee. See *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886) and *Furman v. Georgia*, *supra*;

AND

16. The discriminatory impact of a law, as it is applied can demonstrate its unconstitutionality because of the inability to explain the discrimination on nonracial or class grounds. See *Washington v. Davis*, 420 U.S. 229, 96 S.Ct. 2040 (1976).

WHEREFORE the child respectfully requests this Court, after a hearing, to issue an order finding KRS 208.170 unconstitutional as presently applied and thereby excluding this child from transfer to the circuit court.

Signature Block and Certificate of Service Omitted in Printing
ORDER

Motion having been made and this Court being sufficiently advised,

IT IS HEREBY ORDERED that KRS 208.170 be, and hereby is, declared unconstitutional as applied at the present time in this Court's jurisdiction.

IT IS FURTHER ORDERED that the child, Kevin Stanford, be, and hereby is, retained in the jurisdiction of Jefferson District Court, Juvenile Division for adjudication and disposition as a juvenile.

DATE

JUDGE RICHARD FITZGERALD
JEFFERSON DISTRICT COURT
JUVENILE DIVISION

NO. JEFFERSON DISTRICT COURT
JUVENILE DIVISION

IN THE INTEREST OF A CHILD
KEVIN STANFORD

FINDING OF FACT; ORDER TRANSFERRING
JURISDICTION UNDER KRS 208.170
TO CIRCUIT COURT

** ** * **

This case came on before the Court on the Petition of January 14, 1981, subsequently amended by the Commonwealth with additional facts and charges with the Petition of February 20, 1981 between the two Petitions alleging that in one transaction on January 7, 1981, Kevin Stanford committed the offenses of Robbery 1st Degree, Murder, Sodomy 1st Degree, Rape 1st Degree, Kidnaping and Receiving Stolen Property in a value over \$100, regarding the premises and property of the Checker Oil Station on Cane Run Road in Jefferson County and the person of Barbel Poore.

At arraignment the office of the Public Defender was appointed to represent the Defendant and counsel and member or members of the child's family have been present at all critical stages of the proceedings. The mother is not present at the time of the rendering of this decision.

Subsequent to the arraignment, proof was heard on various motions including a motion to suppress certain evidence based on procedural errors of the police in effecting the arrest. Certain evidence illegally obtained has been ordered suppressed.

On May 22, 1981, a probable cause hearing was held on the Petitions. A motion having been made by the

County Attorney to transfer jurisdiction to Circuit Court pursuant to KRS 208.170.

At that hearing proof was heard from Jefferson County Police Detectives, Hall, Smith, Hash, Tangle, Mr. Billings from the Kentucky State Crime Lab or Ms. Billings, Taylor, Evidence Technician Unit, Ms. Kolb from Metro ID, Mr. Workman from the Coroner's Office, Mr. Sanders, Alex Sloan and Troy Johnson the later being co-defendant, who has plead guilty in Juvenile Court to his participation in the alleged offenses. Probable cause was found of one count Robbery 1st Degree, a count receiving stolen property over \$100, a count of Sodomy 1st Degree and a count of murder. The charge of rape was dismissed.

On July 14, 1981, as well as on August 10, 1981, and subsequently admitted defense evidence on out of state placements, proof was heard on the waiver portion of the transfer hearing. Proof was heard from Mr. Mattingly, of the Department of Human Resources, Mr. Henderson of the Department of Human Resources, Mr. Hildreth, Department of Human Resources, Mr. Matthews, Dr. Williams, Billy Ship, Linda Locking, Ellen Baum Dana Madison of the Urban League as well as file DHR reports and various records. Based on the proof heard the court finds as to the elements for consideration the following:

- 1) Seriousness of the offenses – the offense alleged and for which probable cause has been found are of the most serious nature reflected by the offense against persons as a disregard for human life.

- 2) Age and sophistication of child – Kevin Stanford was born August 23, 1963. The offense was committed when he was 17 and he has subsequently turned 18 in the

detention center. Various testimony was heard regarding his emotional maturity and sophistication. Proof was heard and the Court finds that he has a low internalization of the values and morals of society and lacks social skills. That he does possess an institutionalized personality and has, in effect, because of his chaotic family life and lack of treatment, become socialized in delinquent behavior. That he is emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and reality based therapy for socialization and drug therapy in a residential facility, from the record the following:

Petition and dates from records – The child has been placed in the DHS Group Home, Ormsby Village Treatment Center, Green River Boys Camp, the Department of Human Resources and Rice Audobon Vocational Educational Programs, as a result of delinquency petitions. His progress has been marginal in each based in part on the failure of the County and State to provide meaningful therapy for the child or after care intervention when he was returned after a relatively short time in each placement, to the streets of Jefferson County. His progress was basically that he learned how to behave enough to meet the minimal criteria for release each time approximately or roughly 6 months after placement, then cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated.

As to the reason of prospects of rehabilitation in facilities available to the District Court Juvenile session, other than the possibility of a bridge status commitment to the State Department of Human Resources with a

minimum of approximately six months in an institution, the only facilities for a youth or child of his age with his problems would be out of state placements in specialized long term programs for youth, as per proof the child may benefit from such placement. However, the Court lacks statutory basis to order the state to provide such institutionalization for the length of time sufficient to provide such intervention reasonable calculated (sic) to provide rehabilitation, and the State of Kentucky Department of Human Resources does not, nor does Jefferson County provide a meaningful alternative.

Therefore it is the finding of the Court that it is in the interest of the community and in the interest of the child that Kevin Stanford be transferred to Circuit Court and tried under the ordinary laws governing crime. At this time a Grand Jury date is set down for November 5.

/s/ Richard J. Fitzgerald
 RICHARD J. FITZGERALD, Judge
 Jefferson District Court
 10/28/81
 DATE

NO. 81CR1218

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. NOTICE-MOTION-ORDER

KEVIN STANFORD DEFENDANT

*Notice Clause Omitted in Printing*MOTION TO TRANSFER TO JEFFERSON
DISTRICT COURT JUVENILE DIVISION

Comes the defendant, by counsel, pursuant to KRS 208.170(5)(b) and moves this Court to enter an order transferring the above-styled case back to Jefferson District Court, Juvenile Division. In support of this motion naythe defendant notes the following:

1. The Jefferson District Court, Juvenile Division, issued a written order transferring the defendant to Circuit Court on October 28, 1981.

2. In that order the Court found "That he [the defendant] is emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and reality based therapy for socialization and drug therapy in a residential facility."

3. The District Court further found that the Commonwealth of Kentucky Department of Human Resources offered no facility which could meet the needs of the defendant, but that such facility did exist out-of-state;

4. KRS 208.400 and KRS 208.410 place upon the Department of Human Resources the responsibility for

arranging programs to provide for the specialized treatment of committed according to their respective needs and problems and the responsibility for the development of necessary facilities "to provide an adequate and modern program for the care, treatment and rehabilitation of children";

5. The failure of the Department of Human Services to provide necessary programs under KRS 208.400 and KRS 208.410 should not be grounds for the transfer of a person to circuit court;

6. KRS 208.170(4) requires that any transfer to circuit court be in the best interest of the child;

7. The best interest of the defendant is not served by a transfer from a treatment-oriented system to a punishment oriented system;

8. KRS 208.194 provides for incarceration in a juvenile treatment facility for an indeterminate period of time providing for at least 6 months of institutionalization without being subject to the 18 year old ceiling provided in KRS 208.200 (In at least two statutes KRS 208.180 and KRS 208.200(1)(b), it is recognized that the state can maintain jurisdiction for treatment well past a juvenile's 18th birthday);

9. The law under which the defendant was transferred, KRS 208.170 is being applied in Jefferson County in an unconstitutional manner;

10. KRS 208.170(1) calls for the Court to conduct a waiver hearing when the Court is of the opinion that the juvenile be tried as an adult, however in Jefferson District

Court, waiver hearings are set solely on the motion of the County Attorney;

11. By allowing the prosecutor to select which of the eligible cases be set for a hearing, the Court is allowing executive encroachment into a judicial affair violating the separation of powers doctrine required under the Kentucky Constitution, sections 27, 28 and 109.

12. Selectivity in the enforcement of any law cannot be tolerated as it results in a violation of both equal protection of the law and due process under the Fourteenth Amendment of the United States Constitution: See *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d., 346 (1972), separate opinions of Justices Douglas Brennan, White, Marshall and Stewart; and *City of Ashland v. Heck's Inc.*, Ky. 407 S.W.2d 421 (1966).

13. The fact that only very few of the eligible felony cases in juvenile court are subject to actual transfer proceedings is indicative of selective enforcement and an abuse of discretion.

14. The discretion given the District Court under KRS 208.170 cannot be used as an excuse for arbitrary and selective enforcement which results in due process and equal protection violations; See *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

15. Any law, even if it is non-discriminatory, on its face, may be applied in such a way as to violate the constitutional guarantee of equal protection; *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

16. According to statistics of the Jefferson County Department of Human Services, Office of Research and

Planning, from 1975-1979 69.4% of all case referrals to the juvenile justice system were referrals of white children while only 30.6% of the referrals involved black children. However, of the 56 case referrals to the Grand Jury from Juvenile Court during the same 5 year period 67.9% of the Grand Jury referrals concerned black juveniles while only 32.1% involved white juveniles.

17. The disproportionate impact of the application of KRS 208.170 is indicative of selective enforcement violating equal protection of the law with no reasonable explanation for the discrimination (sic) based on criteria or procedures used to obtain transfers of juveniles to the Grand Jury;

18. The defendant should be entitled to a hearing on the question of a transfer back to Jefferson District Court.

WHEREFORE, the defendant requests a hearing on the above-styled motion be set and, after such hearing, the defendant's case be transferred back to Jefferson District Juvenile Division.

Certificate of Service and Case Style Omitted in Printing

ORDER

Motion having been made and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the defendant, Kevin Stanford, be transferred to Jefferson District Court, Juvenile Division, on all charges contained in the above-styled

indictment, for normal adjudication and disposition (sic) proceedings in the juvenile system.

DATE

JUDGE, JEFFERSON
CIRCUIT COURT

NO. 81CR1218

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

NOTICE-MOTION-ORDER

Notice Clause Omitted in Printing

MOTION TO SEVER DEFENDANTS

Comes the defendant, by counsel, pursuant to RCr 9.16 and moves this Court for a separate trial from his co-defendant, David Buchanan. In support of this motion the defendant notes the following:

1. That the co-defendant Buchanan has made statements implicating the defendant, which if introduced against Buchanan would unduly prejudice the defendant who would not be able to confront and cross-examine Buchanan;

2. Even if statements by Buchanan to the police are sanitized under authority of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) conversations of Buchanan with other witnesses implicating the defendant may be introduced and will be extremely difficult, if not impossible, to sanitize;

3. The defendants will be presenting antagonistic defenses and evidence that may be used against Buchanan, but not admissible concerning Stanford alone, does in fact incriminate the defendant. See *Hopkins v. Commonwealth*, Ky. 374 S.W.2d 839 (1964) and *Tinsley v. Commonwealth*, Ky. 495 S.W.2d 776 (1973);

4. Since this is a capital case, there is the real danger of the jury, in a penalty phase, having to weigh the life of

each defendant against the other instead of deciding the fate of each separate defendant individually on the merits of the case against him alone;

AND

5. A joint trial would cause undue prejudice to the defendant Stanford.

WHEREFORE, the defendant moves this Court for an order requiring separate trial for each defendant.

Certificate of Service Omitted in Printing
Unsigned, Tendered Order Omitted in Printing

NO. 81CR1218

JEFFERSON COUNTY COURT
DIVISION NINE

(title omitted in printing)

NOTICE-MOTION-ORDER

*Notice Clause Omitted in Printing*MOTION TO EXCLUDE DEATH
AS POSSIBLE PENALTY

Comes the defendant, by counsel, and moves this Court to issue an order excluding death as a possible penalty in the above-styled case. In support of this motion, the defendant notes the following:

1. The defendant was a juvenile, age 17, at the time of the commission of the offenses alleged in the above-styled indictment and was transferred to Circuit Court by Jefferson District Judge Richard Fitzgerald sitting as juvenile judge pursuant to KRS 208.170;
2. That the Commonwealth has indicated by the indictment and subsequent pleadings its desire to seek the death penalty in this case;
3. The death penalty as applied to one who was a juvenile at the time of the offense would violate Section 17 of the Constitution of Kentucky and would also violate the evolving standards of decency of this Commonwealth;
4. The death penalty as applied to one accused of a crime while a juvenile would further violate the Eighth Amendment of the United States Constitution as well as the evolving standards of decency of this nation;

AND

5. A memorandum of legal authorities supporting the defendant's position on this motion is attached and made a part of this pleading.

WHEREFORE, the defendant respectfully requests this Court to enter an order excluding the death penalty as a possible penalty in the above-styled case.

Certificate of Service Omitted in Printing
Unsigned, Tendered Order Omitted in Printing

Jefferson Circuit Court, Division Nine

(title omitted in printing)

*ARGUMENT CONCERNING DEATH PENALTY; TESTI-
MONY OF JOHN METZLER AT PRE-TRIAL HEARING;
TRANSCRIPT OF HEARING, 3-1-82, PP. 71-105*

[71] MR. JEWELL: Your Honor, we also tendered a motion dealing with the doctrine of the Workman case which has been upheld twice and later by the Kentucky Supreme Court in which they refused to retreat from this holding both in the Anderson versus Commonwealth and in Friary versus Commonwealth. Also we have the new act of this legislature, which we concede does not go into effect until July of this year, but was passed during the 1980 session which would specifically exempt juveniles from the death penalty by statute. We feel that with this word from this legislature, in addition to the supreme Court holding in Workman addressing the issue of youth and saying that a stringent punishment like life without parole was to deal with only the incordial, we feel that death would be similar in that feeling in stating that incordialability is inconsistent with youth and they would not make that judgment twice having had the opportunity to have a reprieve from it and twice refusing [72] to do so, is guidance for this Court in dealing with the law of this Commonwealth.

THE COURT: Let me deal specifically with this other aspect to it. What exactly is the statute that's going to be effective July 1, 1982?

MR. JEWELL: Effective July 1, 1982, Kentucky Chapter 208 will be done away with as we know it now

dealing with juveniles, Kentucky will have what will be called the Kentucky Unified Juvenile Code which was passed by the 1980 session under Senate Bill 309, the effective date is July 1, 1982. In this code, 208-F.040 Subsection 1 provides that no youthful . . .

THE COURT: Read that a little bit slowly, please.

MR. JEWELL: Okay. KRS 208-F.040 Subsection 1 will provide that no youthful offender who has been convicted for a capitol offense should be sentenced to capitol punishment. The new code provides that youthful offenders or any person, regardless of age transferred to the Circuit Court from the Juvenile Court under the [73] provisions of the new unified code. I would cite 208-A.020 Subsection 40 and Juvenile Court would have jurisdiction, like they do now, of any person who commits a crime who is under 18. 208-A.0301. Therefore, any person who commits, for example, capitol murder, when they're under the age of 18 . . .

* * * * *

MR. JEWELL: Okay, your Honor, if we could bring the statute itself over at that time. It is printed in the new statute after the 1980 session with the warning on it that it's not effective until July 1, 1982.

THE COURT: All, right, what would be the effect that this case was [74] tried after July 1, 1982?

MR. JEWELL: If this case was tried after July 1, 1982, your Honor, I would think . . .

THE COURT: Is there a procedural statute that would be effective to this case?

MR. JEWELL: I believe there would be, your Honor, I think it would be procedural as to how we proceed up here, and how effective the trial would be, and I believe that it would be effective for this trial if this trial was set, say, July 2nd.

MR. JASMIN: Has counsel concluded?

MR. JEWELL: I have concluded with that.

MR. JASMIN: The Commonwealth's position with reference to retroactive application of the statute based upon 446.080 and it specifically says no statute shall be construed to be retroactive unless it's expressly so declared. Now, in 218-F, is that expressly declared that it would be applied retroactively?

[75] THE COURT: The problem is what's the definition of what's retroactive and what's not. Procedural statutes usually apply, not based on the time of the occurrence, but on the time of the procedure. If this is a procedural statute, then it seems to me that it would apply to any case tried after July 1, 1982.

MR. JASMIN: Well, the Commonwealth's position is, that we don't have to worry about whether it's procedural or not if it's a statute, because another statute specifically says that a statute cannot be construed retroactively and it doesn't specify . . .

THE COURT: Shall we dance around that pole again? The question is not whether statute should apply retroactively, the question is whether or not this is a procedural statute. A procedural statute does not apply retroactively, but it applies to the procedure ahead of it.

MR. JASMIN: I would agree with that, Judge. All I'm saying, is 446.080, regardless of the date says regardless [76] to the debate of procedure or substance says that unless the statute specifically indicates it is to be applied retroactively, it shall not be applied retroactively under Subsection 3.

THE COURT: Well, that doesn't answer my question, the question in my mind, Mr. Jasmin.

MR. JASMIN: Well, Judge, all the Commonwealth is saying is that there is nothing in the statute which talks in terms on how statutes are applied and they are talking about 218-F.

THE COURT: Do you agree that offenses committed by juveniles after July 1 of 1982, the death penalty would have no application?

MR. JASMIN: No, I would not agree to that as of this point, Judge, because there is some questions as to whether or not the situation is going to pass or going to go into effect.

MR. HECTUS: It's already passed.

MR. JASMIN: I know [77] that it's already passed. But, the person sponsoring is now in state legislature moving to knock it out.

THE COURT: It's already a law, you're saying it could be repealed.

MR. JASMIN: No. What I'm saying is, is that it is not a law which can be applied until June. What I'm suggesting to this Court is that it's not in effect now and

its sponsor, Maloney from Lexington, is moving currently that it be repealed.

MR. HECTUS: Your Honor, in my brief I did not cite the statute and I would like to adopt that part of Mr. Jewell's motion as to the statutory construction problem and furthermore.

THE COURT: I'm going to reserve judgment on that and take that under consideration. It seems to me this case ought not to turn on whether the case is tried before or after July 1, 1982. I'm more concerned about whether the statute, if it were being tried after July 1, 1982, would apply to this case or not.

* * * * *

[78] THE COURT: I don't, frankly, I don't, anticipate that, you know, that if the . . . if there is a reasonable probability that this statute could have application if the case was tried after July 1, 1982, that you fellows would want to move for a continuance.

MR. JEWELL: I'll be moving for a continuance today.

MR. JASMIN: Your Honor, so that we understand . . . so that I under- [79] stand what the Court is referring to, you are overruling the motion with reference to the death penalty until, but you want to look at 208-F, is that correct, and the anticipated statute which will come effective on July 1st?

THE COURT: I think that, Mr. Jasmin, is substantially correct. I'm not going to rule that the death penalty in an aggravated circumstance, if it's proved, is cruel punishment; nor am I going to rule it's cruel punishment

because it's applied to a 16 or 17-year-old as opposed to an 18-year-old.

MR. HECTUS: So you're distinguishing Workman and we'll read the statute, then?

THE COURT: Because I am concerned about whether . . . I'm going to reserve judgment on that one issue, and that's the one that bothered me the most when I was reading this material last night. It doesn't seem to me that the death penalty ought to turn on anything as gratuitous as whether this case is tried in March or July, [80] if such is the case.

MR. JASMIN: To clear the record then, you're saying the memorandum supplied by counsel for Buchanan, and where he says motion memorandum to exclude death penalty due to insufficient statutory guidance, that's been overruled, is that correct?

THE COURT: I'm overruling all of these motions relating to foreclosing the death penalty except the motion which is directed to the arbitrary and capricious nature or its application in this case because of or the possible arbitration as it applies in this case, because of the statute 208-F.02 Subsection 1. I'm going to reserve judgment on that and I think you'd better response (sic) to that.

* * * * *

Page 81 was deleted in printing

* * * * *

[82] THE COURT: All right. That takes care of all of those motions related to excluding the death penalty.

Now, what about the motion to transfer back to Juvenile Court?

MR. JEWELL: I have a motion, Judge, to that on behalf of Kevin

* * * * *

[83] MR. JEWELL: Okay, your Honor, as to that motion, I raised two basic grounds. One, quoting from the transfer order as well as having independent witnesses present and whether Kevin Stanford is treatable, does not meet unmediability to treatment. He is treatable within the facilities as cited in 208.170 and my second contention is that 208.170 is unconstitutionally applied in Jefferson County in that 16-year-olds who have felonies, all 14-year-olds who have Class A and B felonies are not given a hearing to determine whether or not they should come to Circuit Court, but only a few are given such hearing, [84] and this has resulted in the disproportionate waiver of black children as opposed to white children here to Circuit Court in Jefferson County. And, I have cited some statistics.

THE COURT: I saw your statistics.

MR. JEWELL: I have the man from the Statistics Department here today to testify.

THE COURT: All right, well, let's put him on and hear what he's going to say because the thing that is troublesome about your statistics, of course, is the transfer is related to the type of . . . a lot of different things, including whether the offense was against a person or property with greater penalties given to offenses against persons. The child's prior record, so I mean, it may well

be that the problem is related to a lot of other things other than raw statistics in terms of black/white. I don't know, whether statistics would do deference to your witness, can be very deceiving. I want you to inquire into that subject when you put your witness on. It he

* * * * *

[85] (WHEREUPON, John Metzler was sworn to tell the truth, the whole truth, and nothing but the truth, and testified as follows:)

DIRECT EXAMINATION

QUESTIONS BY MR. JEWELL:

1 Q Would you state your name and place of employment, please?

A John Metzler and I work for the Department of Human Services in Jefferson

* * * * *

[86] QUESTIONS CONTINUED BY MR. JEWELL:

2 Q Now, Mr. Metzler, what department do you work in for the Department of Human Services?

A I work in the office of Research and Planning.

3 Q Okay. What are the duties of the [87] office of Research and Planning?

A Okay, one of the duties of the office is to compile statistical information of the services done by DHS over the calendar year. And, it deals with both adults and juveniles, the statistical information, the agency is an umbrella agency.

4 Q Does your agency keep statistics relating to Juvenile Court, Jefferson District Juvenile Court?

A Yes, it does.

5 Q And do you keep these statistics as a normal part of the business of your department?

A Yes, we do.

6 Q I would ask you about some specific statistics now, I believe you've been subpoenaed to have some here, could you please state in the five-year period from 1975 through 1979 . . . well, first of all, let me ask you, do you have the 1981 and 1980 statistics compiled?

A Yes, we have the . . . okay, we do not have the 1981. We do have the 1980 statistics, I'll say compiled, but it hasn't [88] been available for public distribution yet. We've had problems, so it isn't actually in a report form to be distributed. The information is, however, available.

7 Q Okay. Let's take the statistics which we compile between 1975 and 1979.

A Okay.

8 Q Do you have statistics showing the total referrals to the juvenile justice system for that five-year period and the percentage according to race of the total number of referrals?

A Yes, I do.

9 Q What are the total number of referrals and the referrals per race with the percentages, please?

A Okay.

THE COURT: Are you talking about grand jury, too?

MR. JEWELL: No, this is for the Juvenile Court.

THE COURT: Oh, I see, the total referrals.

A Okay. In that five-year period there were 38,980 juvenile referrals of which [89] 27,066 were white. Did you want a percentage breakdown?

10 Q Yes.

A Twenty-seven thousand sixty-six were white referrals and that represented 69.4 percent of the total, and 11,914 or 30.6 percent were black referrals.

11 Q Okay. Now, do you also have broken down . . . well, let me withdraw this question and ask you first, what is a referral? Would you explain referral to us?

A Okay. Basically a referral could be . . . it's an offense committed by a juvenile, referred to out agency one of two ways, either as a walk-on or through a police referral.

12 Q The numbers which you gave in response to my question of referrals, are not necessarily the numbers of individuals, correct?

A Correct.

13 Q That is correct?

A Correct, correct.

14 Q Because one person could have more than one referral?

[90] A Right, in the course of the calendar year, right.

15 Q I'd like to talk about the handling of the cases, do you have a statistical breakdown on this period, about how many of the total referrals were formally handled and how many of them were informally handled?

A Yes.

16 Q Could you give me percentages there?

A Yes, okay.

17 Q Along with the ratio breakdown, please?

A Okay. Okay, I'm not sure that I actually have . . .

18 Q Do you have the manner of handling by race in a year?

A I have the manner of handling, okay . . .

19 Q I believe it's a one-page document.

A Yes, there it is.

20 Q Okay, if you could give me . . . now, we know we have 27,066 white referrals. How many of those referrals were handled informally during that five-year period?

A Formally, I'm sorry?

21 [91] Q Informally.

A Ten thousand five hundred ninety-six of those twenty-seven thousand sixty-six white referrals were handled informally and that represents 39.1 percent.

22 Q And how many of the black referrals were handled informally during that same period?

A Okay, 3,228 of the 11,914 referrals were handled informally and that's 27.1 percent.

23 Q Okay. Could you explain what you mean in this statistic by informally?

A Yes. Informal is a case that is counselling, at what we call intake, what basically, based on prior history or severity of the charge, the juvenile comes to our agency and meets with a worker and the case is handled on an informal basis, and that is all the action that is taken.

24 Q Okay. So that case never gets to a formal Court hearing?

A Right, right.

25 Q Now, let's go, at this point, to grand jury referrals, please?

[92] A Okay.

26 Q I'd like to know, during this five-year period of time, the total number of grand jury referrals, and then also, a ratio breakdown of than number?

A Okay. During that five-year period there were 56 grand jury referrals, of which 18 or 32.1 percent were white and 38 or 66.9 percent were black.

27 Q Could you break these grand jury referrals down into charge or offense categories for us, please?

A Okay. Of that 56 grand jury referrals, 21 referrals or 37.5 percent were major property offenses. Two were what we call social control offenses, that represented 3.6 percent. Persons where physical harm was done, there

were 30 referrals and that represented 53.6 percent, and persons where no physical harm occurred, there were three referrals, which represented 5.4 percent.

28 Q Would you go now to a breakdown of that five-year period on some felony charges which I've asked you to bring with you today?

[93] A Okay.

29 Q First could you tell us the total referrals during a five-year period on homicides with ration breakdown and the percentages?

A All right. There were 54 homicide referrals during that five-year period, '75 through '79, of which 23 or 42.6 percent were white; 31 or 57.4 percent were black.

30 Q Okay, could you go now to the offense of rape, the number of rapes in that breakdown, please?

THE COURT: This is people handling these cases in Juvenile Court, right?

THE WITNESS: I'm sorry?

THE COURT: You're talking about cases handled altogether in Juvenile Court?

THE WITNESS: Right.

QUESTIONS CONTINUED BY MR. JEWELL:

31 Q These are referrals for these offenses, right?

A Right.

32 Q Could we go now to the offense of [94] rape, please?

A All right. In that five years there were exactly 100 referrals for rape, of which 53 or 53 percent were white; 47, or 47 percent were black.

33 Q And then in that period of years, I notice you have the category felonious sex offenses, do you also have that?

A Yes, yes. Should I . . . okay, is there any need for me to explain the reason why we don't have the other two years or anything like that? I didn't want our statistics to be in jeopardy or whatever.

34 Q How many years do have felonious sex assaults?

A Okay. We actually have felonious sex offenses for the years of '77, '78, and '79. Prior to those years, our coding mechanism did not distinguish between felonious and non-felonious sex offenses. I didn't want to report all sex offenses in this particular report.

MR. JASMIN: What was that number?

A During that three-year period, [95] there were 67 felonious sex offense referrals of which 411 or 61.2 percent were white; 26 or 38.8 percent were black.

35 Q Could we go to the offense next of robbery?

A Okay. During that five-year period again, there were 774 robbery referrals, of which 324 or 41.9 percent were white; 450 or 58.1 percent were black.

36 Q Could we go then to the offense of burglary?

A Once again, the five-year total there were 4,914 burglary referrals in that five-year period, of which 3,174

or 64.6 percent were white; 1,740 or 35.4 percent were black.

37 Q Could we go then to the category of assault and then in this category if you would include the years 1975 and 1976, aggravated assaults, and for '77 through '79 assault in the first and second degree, on the felony assaults?

A I'm afraid, Mr. Jewell, that I combined all five years in that.

38 Q Did you include any misdemeanor [96] assaults in this or is this all aggravated in the first and second degree?

A All of them are first and second degree.

39 Q So you have a five-year total for aggravated assault and first and second degree assault?

A Right.

40 Q Okay. If you could give us those statistics?

A All right, there were 726 assault referrals during that five-year period, of which 371 or 51.1 percent were white; 355 or 48.9 percent were black.

41 Q Would you then go to the offense of wanton endangerment, first degree, please?

A Okay, for that specific referral, I have only three years of data and that's '77 through '79. During that three-year period, there were 324 referrals for wanton endangerment in the first degree of which 200 or 61.7 percent were white; 124 or 38.3 percent were black.

42 Q Could you go to theft, including only theft over 100 and former grand larceny?

[97] A Okay. Well, for that five-year period, theft over \$100.00 referrals, there were 2,375 of which 1,520 were white referrals; 855 or 36 percent were black referrals.

43 Q Then could you go to the offense of receiving stolen property over 100?

A Okay. Once again for that category I only have three years worth of information, and during that three-year period, there were 301 referrals for receiving stolen property over \$100.00 of which 202 or 67.1 percent were white; 99 or 32.9 percent were black.

44 Q Okay. Mr. Metzler, did you break down grand jury referrals into specific charges? I know you broke them down into general categories, did you ever break them down into specific charges, or do you all have that information?

A I do not have it with me, I'm afraid.

45 Q Okay. Did you break down the offenses of homicide, at all, to what happened to all homicides that came into Juvenile Court?

[98] A Yes. I'm afraid I did not bring it with me, in the subpoena it wasn't requested, you mean disposition, correct?

46 Q Yes, homicide referrals . . .

THE COURT: Are you talking about grand jury?

MR. JEWELL: I'm talking about what percentage of homicides . . . what percentage of homicides that went to the grand jury, we know the number which is eight, what happened to the others?

THE COURT: All right.

MR. JEWELL: There were 54 homicides that came into Juvenile Court, what I'm asking is if he brought the number of homicides that were waived to the grand jury?

A I did not.

47 Q Okay.

MR. JEWELL: I have no further questions, at this time, your Honor.

* * * * *

[99] CROSS EXAMINATION

QUESTIONS BY MR. JASMIN:

48 Q In those statistical breakdowns, with reference to those referred to the grand jury, did you make any distinction between age, as to age?

A They're all juveniles.

49 Q I know they're all juveniles.

A Not for this particular question, I could probably obtain it.

50 Q Well, sir, statistics refer to children who are 16 years of age or older?

THE COURT: They have to be 16 or 17.

THE WITNESS: Okay, right.

51 Q Do you have a breakdown, sir, which would indicate to me the number of children that came in 16 years of age or older and were waived to the grand jury?

[100] A I would have that information.

THE COURT: You have 54 homicides, we don't know whether those . . . anybody from theoretically three years old to 17.

A Right, right, right. We had 54 referrals. However, of the grand jury referrals, I'd have to, okay, assume that these grand jury referrals are gathered from Court documents and that, obviously, those referrals would not have been given unless they were 16 and 17 years old.

52 Q all right, in that instance, between the period 1975 to 1979, there were only 56, is that correct, sir, total 56?

THE COURT: Fifty-four referred from the grand jury.

MR. JASMIN: Now I'm talking about who were referred to the grand jury.

THE WITNESS: There were 56 referrals to the grand jury altogether.

THE COURT: Fifty-six of all kind.

MR. JASMIN: I under- [101] stand that.

THE COURT: Well, I know, I just want to be sure I do.

MR. JASMIN: All right, Judge.

QUESTIONS CONTINUED BY MR. JASMIN:

53 Q My question now is 1975 out of that total, how many blacks came to the grand jury and how many whites, for the year of 1975?

A I do not have that information.

54 Q You don't have that information for 1966?

A I do not have.

55 Q '77?

A No.

56 Q '78?

A No.

57 Q Or, '79?

A No.

58 Q And what I think is pertinent to us, sir, do you have any statistical breakdown which would indicate the number of blacks and whites who were referred to the grand jury with a priory (sic) history in Juvenile [102] Court of burglary, robbery, arson, and subsequently committed murder, involved with a robbery, sodomy, and rape?

A No, your Honor. No, sir. Our reporting document is not that sophisticated to deal with prior actual histories of these delinquents. We did have information base on prior history the number of referrals that say that individual would have, but as to the severity of those reasons for the referral, we do not have that.

59 Q So now, out of those 56 who were waived to the grand jury, you can't tell us what the entire number of referrals or anything like that was, is that correct?

A Correct.

60 Q Your statistics would give no indication then what the background or whatever is?

A Off the top of my head, I could not say that we would have that information in terms of the severity of the charges. I think, we possibly do have prior histories and actual number of referrals, but I'd have to look through our data basis to see if [103] that was factual for sure.

61 Q And, you couldn't tell me out of the total number whether you are talking about informal or situations being handled informally, what I mean, is you don't have any breakdown as to how many of those persons were first-time offenders, is that correct?

A We would have that information.

62 Q You would have?

A Right.

63 Q But you don't have it here today?

A No, I don't. It was not requested.

64 Q All right. You can't tell me, sir, what total of those folks that came up, again it's a question, if I got your answer, who were charged with a combination of murder, robbery, and rape, sodomy in the first degree or kidnapping, correct?

A Correct.

65 Q Okay. And when you talked about your percentages in terms of all those who come in charged of doing this or that, you're talking about 53 . . . all of those were charged with doing physical harm was 53 or [104] 30 percent, or 53.6 percent was physical harm referrals, or 53.6 percent were physical harm, a category that has numerous classifications in it. We basically have five major classifications that we usually refer going by these classifications.

MR. JASMIN: So, in your breakdown do you show a breakdown between blacks and whites who were referred, you have nothing to show what the individuals previous history was, which in effect, triggered his coming up, is that correct, sir?

A As to actual offenses, correct. As to number of offenses, I believe we would have the information, but off the top of my head we would have, let's say, grand jury referrals, okay, if they were first offenders they had two to five referrals prior, ten referrals or more but not as to the actual severity of that referral, no.

THE COURT: You wouldn't know whether they were shoplifting or armed robbery?

THE WITNESS: Not in [105] our system. Obviously, the child's record, would contain that information.

66 Q You wouldn't have a breakdown that would say he was referred because he was out of control or was a truant, either, would you?

A No.

67 Q So your statistics can't tell us anything with reference to the severity of the offense and the true nature of the person's background?

A No.

* * * * *

PETITIONER'S MOTION TO TRANSFER CASE BACK
 TO
 JEFFERSON DISTRICT COURT,
 JUVENILE DIVISION IS DENIED.
 TRANSCRIPT OF HEARING, 3-1-82, PP. 180-184]

THE COURT:

* * * * *

The next thing is in dealing directly with the rest of your motion, very frankly, I considered that you all . . . I know that I'm supposed to consider the question separately from the District Court or at least that I'm entitled to exercise separate and different discretion than the District Court exercises, but it is quite evident that all of this testimony that I've heard today about transferring the case back to the Juvenile Court, is cumulative of what was said in the Juvenile Court and there's a very thorough going opinion that was written by Judge Richard Fitzgerald who's extremely knowledgeable on the subject of juveniles, from what I understand, I consider myself somewhat of a novice in applying the statute. I find it impossible to even understand where it says in the statute, if the Court determines that it is "in the best interest of the child and the community to order such a transfer, that the transfer will be made." I don't see how if it could ever be in the best interest of a child to be tried as an adult. I think the statute has to be determined to mean that the Court shall waive the best interest of the child and the best interest of the community. And then, decide in weighing both and considering all of the factors that are subsequently enumerated, that's how I interpret the statute.

MR. JASMIN: Are you referring to Subsection 3, Judge?

THE COURT: Yeah. How could it ever be in the best interest of the child to be tried as an adult, particular in a capitol case. The statute specifically colloquys in Subsection 1 that this will be done in capitol cases.

MR. JASMIN: Correct.

THE COURT: There isn't, I doubt the position is defensible, if you consider solely the best interest of the child that it could ever be in the best interest of the child to be given a sentence of capitol punishment.

MR. JASMIN: Judge, I would agree with you on the face of it, but the other thing that I would say is under Subsection 3, it lays out those items which are applicable.

THE COURT: That's what I say, I interpret it to mean that you simply weigh the best interest of the child and of the community, you consider all of these items that are subsequently listed and it's very obvious that Judge Fitzgerald considered every one of these items in great detail. I have now, both read his opinion and read your briefs and memorandums, and listened to this testimony, and I don't reach any different conclusions than he reaches, and that is, weighing all these factors that are listed, that I find that it is appropriate that these two accused be tried as adults. I think that in the best interest of the community and the factors that are listed are weighed, that it overweighs whatever interest the child has and when you consider these factors, the child's prior record in each case and the prospects for adequate protection of the public in each case, which is flim, the

likelihood of rehabilitation of the child, rehabilitation of the child by the usual procedures, services, and facilities currently available, through the juvenile justice system that Judge Fitzgerald made the finding that was compelled by the facts that were before him and I now make the same finding. So, I find that these children . . . I overrule your motion to transfer the case back to Juvenile Court. I found that these two accused should be tried as adults. So, that takes care of it, subject to whether all of the proper procedures and procedural steps have been totally followed in getting here.

*[MOTION FOR SEPARATE TRIAL FROM
CO-DEFENDANT, DAVID BUCHANAN IS OVERRULED;
TRANSCRIPT OF HEARING, 3-1-82, PP. 184-186]*

THE COURT: Yes, sir. Also, on the motion to sever, there is nothing stated in your motion to sever that I picked up that had any consequences except this is the kind of case which would ordinarily be tried together. I didn't pick up anything except this concern about the statements implicating a co-defendant that had any significance to it, and that's why I mentioned that we would apply the rule of the Bruton case that whatever statements are admitted so that that aspect is eliminated.

MR. JEWELL: The Bruton rule, we feel, Judge, could possibly easily apply to the case of the written statements taken by the police officers in the case of the statements related by other people as to what the co-defendants told them, which also implicates my client, I feel that's where we're going to run into big problems. For example, and I'm speculating here as to what might happen, let's say the Commonwealth calls the uncle of the co-defendant to the stand, who may say the co-defendant told me this and that, and he told me that Kevin did this and that. Well, I think we're going to have difficulty in telling the lay witness that your statements are to be Brutonized. We don't want you to say . . .

THE COURT: Well, that's going to be the Commonwealth's problem. If they don't succeed in doing it, well, they're going to have a mistrial. They're going to have to very carefully instruct every witness that a statement by the accused can only be used against that person, and it's hearsay as to some other person and that, of course, it

would be an awful thing to go through a trial and sequester the jury and have a mistrial, but most of the factors that would relate to a joint trial applying in this case, so I really don't see any reason why it would be appropriate to sever. Now, I think we've taken care of everything.

MR. JEWELL: So I take it the motion to sever is overruled, at this time?

THE COURT: Yes. That leaves, as far as I know, only the suppression hearing and the two points that we've reserved.

No. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

ORDER

* * *

Motion having been made and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the above-styled Indictment shall not be tried as a capital offense, but that the penalty for the charge of Murder shall be that of a Class A felony from 20 years to life.

Overruled
/s/ Charles M. Leibson
HON. CHARLES LEIBSON, JUDGE
JEFFERSON CIRCUIT COURT

June 30, 1982
DATE ENTERED

Jefferson Circuit Court, Division Nine

(title omitted in printing)

[DISCUSSION OF PENDING KENTUCKY LEGISLATION
CONCERNING DEATH PENALTY;
TRANSCRIPT OF HEARING, 3-8-82, PP. 9-10]

THE COURT: * * * * *

So, what it really comes down to, presumably, you fellows are going to ask for a continuance until after July 1, and what it really comes down to is that the case is going to get continued until after July 1, unless through some action of the legislature, this bill should be repealed. That's really what this comes down to, the bottom line. Now, I sure as the devil would like to know, if it was possible, before Friday. I almost think we ought to set a dead-line for Friday because we got 100 people subpoenaed to come in on Monday. Somebody ought to call those people and head them off, if the case is going to be continued.

MR. JASMIN: I agree with that I don't have any problem with that at all,

THE COURT: So, really that's about where we are on this, that's the bottom line,

MR. HECTUS: We'll go along with passing this until 8:30 Friday morning so we can all sort this out.

THE COURT: My problem is that I'm going to be out of town Thursday and Friday. It doesn't make any difference, you all will know by Friday whether this bill is . . . as far as I know, the it doesn't stay in session on Friday anyway, it goes home,

MR. JASMIN: On Friday evenings.

MR. HECTUS: If it doesn't, we will make our motion by Friday, anyway.

MR. JEWELL: Okay, we will go on the record and make a motion to continue at this time and ask the Court to take it under advisement until . . .

THE COURT: That's exactly what I'll do.

MR. HECTUS: I'll join in the motion.

[20] NO. 81CR1218 JEFFERSON CIRCUIT COURT
NINTH DIVISION

(title omitted in printing)

ORDER

Comes the Defendant and the Commonwealth and moves the Court to continue this case and as grounds therefore, states as follows: By agreement case is reassigned to the date set out below, due to a decision pending in the legislative regarding the death penalty of juveniles.

Defense is not ready due to an exam of the defendant.

Defendants to report back in one week regarding the progress of the exam.

	/s/ Franklin P Jewell
/s/ (Illegible)	/s/ C Thomas Hectus
Commonwealth Attorney	Defense Attorney

The Court being sufficiently advised, this case is continued to the 2 day of August, 1982, for trial.

/s/ Charles M. Leibson
CHARLES M. LEIBSON,
JUDGE

DATED: March 15, 1982

NO. 82CR0406 JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

NOTICE-MOTION-ORDER

Notice Clause Omitted in Printing

MOTION TO PROCEED AS CLASS A FELONY

Comes the defendant, by counsel, and moves this Court to enter an order that the above-styled indictment shall be tried as a Class A Felony as opposed to a capital offense. In support of this motion, the defendant notes the following:

1. Defendant, by counsel, has previously filed with this Court on or about February 25, 1982 a motion to exclude death as a possible penalty along with a memorandum in support of defendant's motion to exclude the death penalty, and on or about March 5, 1982 the brief pertaining to application of death penalty for juvenile crimes after July 1, 1982.

2. In ruling on these motions, the Court ruled that because of the passage of KRS 208F.040 with an effective date of July 1, 1982, the above-styled action could not be tried as a capital case if, in fact, KRS 208F.040 went into effect July 1, 1982.

3. The Court expressed reservations about ruling on the defendant's motion to exclude the death penalty based on the defendant's argument under Kentucky case law, specifically the case of *Workman v. Commonwealth*, Ky. 429 S.W.2d 374 (1968) and subsequent cases because the

Court felt it would be presumptuous for it to rule on a constitutional issue at the time the motion was made.

4. KRS 208F.040, as well as the entire Kentucky Unified Juvenile Code, was given a new effective date by this session of the Kentucky General Assembly. The new effective date of the Kentucky Unified Juvenile Code including KRS208F.040, which would not allow the death penalty for any person who commits a crime under the age of 18, is July 1, 1984.

5. This new effective date was given because of financial difficulty with the implementation of the entire code.

6. Under the most recent case of *Smith v. Commonwealth*, KY., ___ S.W.2d ___ (29 KLS 7, p. 14, 1982), the Court has the power in any capital case to relieve the jury of any consideration of the death penalty. In that case, the Court would not allow the case to go into a penalty phase, even though the Commonwealth was seeking the death penalty, because the Court reasoned that it would be unconstitutional to give a "nontrigger man" the death penalty since the "trigger man" had received the minimum sentence of twenty years.

7. Since it now appears certain that a trial court may refuse to allow a case to be tried as a capital case, even though the Commonwealth claims aggravating circumstances, if the Court finds that the penalty would be disproportionate or that the penalty would be infirm in some other way, the defendant respectfully asks this Court to reconsider the merits of the defendant's arguments based upon the case law under *Workman v. Commonwealth*, *supra*, and subsequent cases and based upon

the fact that the Kentucky General Assembly is consistent in making its desires known that KRS 208F.040, which would exclude the death penalty to those committing crimes under the age of 18, shall become law of this Commonwealth within two years from the date that the above-styled action is set for trial. The defendant's position has been clearly stated in detail and its prior motion to exclude death penalty as possible punishment, its prior memorandum in support of defendant's motion to exclude the death penalty, and its prior brief pertaining to application of death penalty for juvenile crimes up to July 1, 1982.

WHEREFORE, relying on arguments previously stated to this Court, the defendant moves this Court under its discretionary power to relieve the jury of any consideration of the death penalty to proceed with this case as a Class A felony for which punishment for the charge of Murder would be 20 years to life.

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NO. 82-CR-0406 JEFFERSON CIRCUIT COURT
 DIVISION NINE (9)
 COMMONWEALTH OF KENTUCKY PLAINTIFF
 VS. NOTICE-MOTION-ORDER
 DAVID BUCHANAN DEFENDANT

*Notice Clause and Certificate of
 Service Omitted in Printing*

**MOTION TO DISMISS
 CAPITAL PORTION OF INDICTMENT**

Comes the defendant, David Buchanan, by counsel, and respectfully requests this Court to dismiss the capital portion of the indictment herein, and order that Ccount (sic) 1 (murder) be prosecuted as a Class A felony. As grounds therefore, defendant states as follows:

Troy Johnson also testified that there was no plan or intention to kill the victim:

Q: When did you see David on January 7?

A: In the late afternoon, in the morning.

Q: Where was he and where were you when you were together?

A: I went and picked him up.

Q: At his house?

A: Yes.

Q: And came over to where?

A: Old Third.

Q: But where did you go after you picked him up?

A: Back out to my brother's house.

Q: Okay and where is that located?

A: Out Newburg.

Q: How long were you kids together that day - that afternoon or whenever it was?

A: How long were we together?

Q: Uh-huh.

A: We were together all day.

Q: Okay, did you discuss anything with regard to the Checker Oil Station?

A: Yes.

Q: Answer the question.

A: Yes sir.

Q: What did you discuss?

A: How easy it was.

Q: How easy it was for what?

A: To rob it.

On cross-examination, Troy Johnson acknowledged that there was no plan to kill anyone:

Q: Alright, when David came to your house the day this happened isn't it true that when David asked you to get the gun that he assured you that nobody would get hurt?

A: Yes sir.

Q: So both you and David thought that the gun wasn't going to be used, isn't that true?

A: Yes sir.

Q: And as far as you knew and as far as David knew you were going out to rob the gas station according to your testimony?

A: Yes that's right.

Q: So David never spoke about anything else?

A: No sir.

Q: Especially shooting anybody?

A: Yes sir.

5. Recently, the United States Supreme Court held that a defendant found guilty of "felony murder" (i.e., what would amount to "wanton murder" in this Commonwealth) could not be constitutionally subjected to a sentence of death. In *Enmund v. Florida*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (July 2, 1982), the United States Supreme Court vacated Enmund's sentence of death because he was not the trigger man and did not have an intent to kill the robbery victim. The Supreme Court found that it was constitutionally impermissible under the Eighth Amendment to treat those who kill, in the same manner as those who neither kill nor intend to kill.

6. This court has the inherent authority to preclude the Commonwealth from submitting the case to the jury on the issue of capital punishment. Recently, the Supreme Court of Kentucky affirmed the action of this court in so doing. *Commonwealth of Kentucky v. William Bonnie Smith*, Ky., ___ S.W.2d ___ (June 15, 1982). In *Smith*, this Court found that it would be unconstitutional to sentence Smith, the "non-trigger man," to death since it would be disproportionate under the facts of that case. Recognizing that the ultimate sentencing power as to capital punishment lies with the trial court, and not the jury, the Kentucky Supreme Court stated that "[i]t therefore becomes self-evident that the court should not be required to

entertain an exercise in futility and preside over a hearing of any duration when it will ultimately decide, for as significant a reason as expressed in this record, that such recommendation by a jury would have been, in the trial court's opinion, 'disproportionate.' " *Smith, supra* at p. 5.

7. Defendant David Buchanan submits that to subject him to a sentence of death for an offense for which he was neither the trigger man nor had a shared intent to murder would be cruel and unusual punishment. Additionally, because, as to the offense of murder, David Buchanan does not stand in a significantly different position than that of Troy Johnson, who was committed to a Department for Human Resources boy's camp and since released, a sentence of death for David Buchanan would be disproportionate. Accordingly, to engage in a lengthy sentencing hearing, assuming arguendo that David Buchanan were convicted of murder, would be an exercise in futility because any sentence of death would be constitutionally impermissible.

WHEREFORE, defendant David Buchanan respectfully requests this Court to exercise its inherent authority and dismiss the capital portion of the indictment, and further, to direct the Commonwealth to proceed as to the murder count as a Class A Felony.

Signature Block Omitted in Printing

NO. 82-CR-0406 JEFFERSON CIRCUIT COURT
 DIVISION NINE (9)
 COMMONWEALTH OF KENTUCKY PLAINTIFF
 VS. ORDER
 DAVID BUCHANAN DEFENDANT
 * * * * *

Upon motion of the defendant, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the capital portion of the indictment herein, be, and it hereby so, dismissed. It is further ordered that Count 1 (murder) be prosecuted as a Class A Felony.

Comm. Has No Objection /s/ Charles M. Leibson
 (Handwritten Notation by HON. CHARLES
 Trial Judge) LEIBSON, JUDGE
 [Reprinted from Original] JEFFERSON CIRCUIT
 COURT
 DIVISION NINE (9)

DATE: _____

Entered in Court
 July 28, 1982

Handwritten Notation by Trial Judge

"Clerk - Hold

Entering this Order I want
 Hearing tomorrow on whether
 only ____ (illegible) is that
 Buchanan non-triggerman -
 What is ____ (illegible) of Troy
 Johnson as to circumstances of
 shooting??"

CML

[Reprinted from
 Original]

"Hearing Held - conceded by Com. Atty. that death penalty would be unconst. for Buchanan under *Enmund v. Fla.*"

CML

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

NOTICE-MOTION-ORDER

Notice Clause Omitted in Printing

RENEWAL OF SEVERANCE MOTION

Comes the defendant, by counsel, and renews his previously made motion to sever defendants for trial under grounds cited in his previous motion, and additional grounds as follows:

1. Since the date the trial court overruled the defendant's initial motion to sever it has been determined that proceedings against the co-defendant shall not be capital in nature.

2. To make Stanford jointly try the case with Buchanan, whom the jury will know is not eligible for the death penalty would prejudice Stanford by putting him immediately in a bad light with the jury as the main actor in the crimes.

3. That there is great danger that the jury will consider in the sentencing phase in Stanford's case evidence introduced in the guilt phase which applied only to Buchanan.

4. Since the Court has ruled that the defense has only ten peremptory challenges between the two defendants Stanford will be denied a full set of challenges even though he must concern himself with the additional juror

question of whether that juror is more likely to give the death penalty.

5. In a joint trial there is also the possible danger that the jury will automatically consider death penalty for Stanford reasoning that he must be the worse of the two defendants because the other defendant is not eligible for the death penalty.

6. It is obvious that both the Commonwealth and the co-defendant Buchanan will attempt to paint Stanford as the "trigger man". To expect defendant Stanford to defend for his life on both fronts would place an unreasonable burden upon his defense and would severely prejudice his rights at trial and the only way in which the defendant Kevin Stanford can receive a fair trial for his life is to be tried separately and apart from the co-defendant David Buchanan.

WHEREFORE, the defendant moves this court to enter an order granting Kevin Stanford a trial separate and apart from the co-defendant David Buchanan.

Certificate of Service Omitted in Printing

NO. 82CR0406

JEFFERSON CIRCUIT COURT

DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

ORDER

KEVIN N. STANFORD

DEFENDANT

* * *

Motion having been made and this Court being sufficiently advised,

IT IS HEREBY ORDERED that Kevin Stanford shall be tried separately and apart from David Buchannon.

IT IS FURTHER ORDERED that trial date for Kevin Stanford be set at 2nd day of August, 1982.

Overruled

/s/ Charles M. Leibson
JUDGE, JEFFERSON
CIRCUIT COURT

NO. 82CR0406

JEFFERSON CIRCUIT COURT

DIVISION NINE

(title omitted in printing)

NOTICE-MOTION-ORDER

Notice Clause Omitted in Printing

MOTION TO EXCLUDE POSSIBLE DEATH
PENALTY AS A RESULT OF DENIAL
OF DUE PROCESS

Comes the defendant, by counsel, and moves this Court to enter an order excluding possible death penalty in the above styled case as a result of the defendant having been denied due process by a previous order of this court excluding the death penalty for a co-defendant. In support of this motion the defendant notes the following:

1. That the defendant and co-defendant David Buchannon were both indicted for murder and other aggravating offenses under indictment no. 82CR0406.
2. That said indictment did not distinguish which one of the two individuals was the "trigger man".
3. Recently the court excluded the death penalty for the co-defendant David Buchannon based upon his status as the "non-trigger man".
4. This court's decision was based in part on pre-trial hearings as well as representations made by the commonwealth.
5. The decision as to which defendant, if either, actually committed the act of murder is a question of fact and therefore a jury question.

6. For the court to intervene before trial and make findings of fact binding at trial detrimental to this defendant denies him the due process of law.

7. The prejudice resulting from the court's pre-trial decision is that now Stanford will have to face a capital trial joined with a non-capital co-defendant, thus giving the jury the impression that Stanford is the more evil, the more deserving to die of the two and furthermore, under prior rulings by this court Stanford will have to share one set of jury challenges with the non-capital co-defendant, thus giving him only half of the actual challenges which he would normally have, even though he is the only one who will be concerned about challenges relating to the issue of the death penalty.

8. Stanford's right to have a jury determine all the facts surrounding his charges has been violated by the court's pre-trial ruling in reference to Buchanan thus making Stanford appear to be the major actor in the alleged crimes contrary to the allegations in the joint indictment.

9. To subject Stanford alone to the possible penalty of death deny him equal protection of the law, due process under the law and his right to a fair trial.

WHEREFORE, the defendant moves this Court to enter an order excluding death as a possible penalty.

Certificate of Service Omitted in Printing

NO. 82CR0406

JEFFERSON CIRCUIT COURT

DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

ORDER

KEVIN N. STANFORD

DEFENDANT

* * *

Motion having been made and this Court being sufficiently advised,

IT IS HEREBY ORDERED that the trial of the above-styled indictment in reference to Kevin N. Stanford shall proceed as a trial on a Class A Felony and possible penalty of death shall hereby be excluded.

"Overruled"

(s) Charles M. Liebson

JUDGE, JEFFERSON CIRCUIT COURT

Entered in Court
August 2, 1988

Jefferson Circuit Court, Division Nine

(title omitted in printing)

[ARGUMENTS AND RULINGS MADE AT TRIAL
CONCERNING SEVERANCE AND DEATH PENALTY;]

[TRIAL TRANSCRIPT (TE), VOL. I, pp. 30-35]

[30] MR. JEWELL: Would it be advisable to go to Chamber's to discuss this matter?

THE COURT: No, we can have our bench conference out here and have enough privacy. Okay, this is another motion for excluding the death penalty with reference to Kevin Stanford.

MR. JEWELL: This motion is based upon and we still have one based upon Kentucky law and the new statute, but this one is because, as I understand it, the death penalty has not been excluded on this basis but because there's been factual evidence that he was the non-trigger man, in *Edmonson v. Florida*, I think it is . . .

THE COURT: Yes, sir.

MR. JEWELL: Well, we feel that ruling prejudices Stanford and the Court has made a [31] finding of fact which is that it is the province of the Jury and the mere fact now that we go to trial with Buchanan, who is not eligible for the death penalty, and the fact that Stanford being the only individual that is eligible for the death penalty under the same count, acting alone or in concert with another and the fact that we have to try them together, if the Jury sees only one eligible for the death penalty, we feel that that would prejudice the rights of Kevin Stanford in that he's already been determined to be most guilty or wrong.

THE COURT: Well, the Jury . . . I don't intend . . . unless somebody tells them . . . I don't intend to tell them . . . the Court has made a determination about that. All I intend to tell them in this case is that the defendant, Buchanan, is being tried with the possible penalty of life imprisonment and the defendant, Stanford . . . Buchanan is being tried in a non-capital case and Stanford is being tried in a capital (sic) case. This ruling was made after the Commonwealth Attorney made it clear and conceded in the argument that involved this very subject. He made a distinction that he was clearly taking the position . . . the legal position of the participation in this case, the participation being that Stanford was the trigger man and Buchanan was not. But, the Jury is not going to be caught up in that and they're not going to be told that the case is being tried in this posture because [32] the Court thinks that Stanford was the trigger man and Buchanan was not. They're not even going to be told that the case was ever indicted against Buchanan. They have . . . the Commonwealth has a right to try one person for a capital offense and not the other person. I've been through this and you have to have facilitation to robbery with another person who's charged with robbery and the Commonwealth has told me they're clearly intend, in this case, to take the position that Stanford was the trigger man and, that's why they're seeking the death penalty and Buchanan was not. I assume that that's the posture that the case will be presented to the Jury. No way do I intend for anybody to suggest that I have made the judgment that the one who's being tried as a trigger man . . . I'm not stating this very clearly, Frank, but I think you understand what I'm trying to say. I hope you do and I hope

Mr. Jasmin does. The Jury is being told that this case is being prosecuted against Buchanan as a life imprisonment case and being prosecuted against Stanford as a death penalty case; not that the Court is saying how the case should be prosecuted.

MR. JEWELL: Okay, our main problem with that was we felt that the ruling excluding the death penalty was basically improper. We thought the facts all should have been submitted and then instructions governing the facts; then, if the Jury, under the principal of complicity found that the death penalty should only apply [33] to Stanford, so be it. The only other thing, the ruling would be proper but we felt it invaded the factual province of the Jury in that regard.

THE COURT: Well that occurred to me after . . . last Monday after motion hour. I had Mr. Hectus and Mr. Buchanan . . .

MR. JASMIN: Jasmin.

THE COURT: Mr. Jasmin, you're prettier than Buchanan, anyhow. See, that's why I don't want to have that microphone on. I'm constantly prone to say something like that. Anyhow, you know, but that's besides the point. That's just a joke. At that hearing, Mr. Jasmin conceded very openly and to his credit, I mean, that he was definitely, positively taking a position, a legal position obviated the factor, and, his legal position is that as far as the Commonwealth is concerned, Stanford is the trigger amn (sic) and Buchanan is not. And, there is, of course, no way that that precludes from arguing the contrary. You can argue the contrary all you want. They have got the wrong guy, but that is the legal position of

the Commonwealth. It's a judgmental admission, if you please, that's been taken by the Commonwealth, that's why it's not an issue in the facts of this case.

MR. JASMIN: The Commonwealth's position is that all of the evidence we have is pointed to the fact that Kevin Stanford was the trigger man.

THE COURT: So, that's where [34] I'm at and I overrule your motion. I'm glad you put it up, not that the Court has made any judgments about who should be tried death penalty or non death penalty, but as expressed by the Commonwealth; again, Stanford for the death penalty because they consider him to be the trigger man and they are going to prosecute against Buchanan for life imprisonment because they do not consider him to be the trigger man.

MR. JEWELL: Okay, our problem is, if that is the case we felt it should have been decided in the penalty phase or on a motion of the Commonwealth to ammend (sic) . . . a motion as opposed to Buchanan . . . a motion to exclude the death penalty based on factual issues.

THE COURT: Well, you're overruled. Cases are changed all the time. For example, every murder case is almost always charged as a capital case. Then, the Commonwealth has to come forward with aggravating circumstances then . . . even so, that doesn't apply here, then they change the case from a capital case to a non capital case.

MR. JEWELL: We have renewed our severence motin (sic) as well. We feel we prejudiced by having to try a capital case with a non capital co-defendant.

THE COURT: Mr. Jewell, I overruled you on that, too.

[35] MR. JEWELL: We also have one motion which the Court have under submission to exclude the death penalty based on the defendant's age which has not been finally ruled on.

THE COURT: I thought I had ruled on that.

MR. JEWELL: You remember you want to wait to see if the law is repealed (sic).

THE COURT: You're right, I told you how I was going to rule on it.

MR. JEWELL: And, now the law was merely delayed, so I filed a follow-up motion to that back in June and the Court took it under submission.

THE COURT: My position is that when the legislature moved that to 1984, that will be delayed then, too, in my opinion. So, you're overruled on that, too, the case will be tried as a capital case.

* * * * *

*[PETITIONER'S RENEWED OBJECTION TO CASE
PROCEEDING AS CAPITAL OFFENSE; PETITIONER'S
TENDERING OF INSTRUCTIONS IN PENALTY
PHASE AND OBJECTION TO
TRIAL COURT'S INSTRUCTIONS.]*

[TRIAL TRANSCRIPT (TE) VOL X, pp. 1365-1366]

MR. JEWELL: I need to get two things on the record, Judge. Let the record reflect our objection to the instructions and we have provided the Court Reporter with a copy of our tendered instructions marking what is given out of there plus we also renew our objections which we made throughout the trial as to trying the case as a capital case. I take it both of those are overruled?

THE COURT: Yes, overruled.

[RULING EXCLUDING TESTIMONY OF ROBERT JONES
IN PENALTY PHASE OF TRIAL; AVOWAL TESTIMONY
OF ROBERT JONES;]

[TRIAL TRANSCRIPT (TE) VOL. X, pp. 1483-1500]

[1483] THE COURT: What next, counselor?

MR. JEWELL: Your Honor, we would call Mr. Robert Jones.

(WHEREUPON, Robert Jones was sworn to tell the truth the whole truth and nothing but the truth and testifies as follows:)

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. JEWELL: Your Honor, as with Mr. Davis, Mr. Jones is a former inmate of the criminal system. We would inform the court that the only conviction that he has is for robbery, is that correct, Robert?

[1484] MR. JONES: Yes, sir.

THE COURT: It's a robbery case from 1960?

MR. JONES: Right, 1960.

MR. JASMIN: There was one other conviction that was later set aside in Federal Court. That is the only conviction which he has remaining is that robbery conviction from 1960?

MR. JEWELL: Yes.

MR. JASMIN: Mr. Jones weren't you involved in a gas station robbery that was . . .

THE COURT: I'm not sure about that. That case wasn't tried in my courtroom and I don't know what the results of that case was.

MR. JEWELL: Mr. Jones has informed me of that and that Mr. Dawson represented him, and it is in the file which Mr. Dawson keeps.

THE COURT: I don't know what the disposition of that case was.

MR. JASMIN: I can't remember.

THE COURT: I'm going to declare a recess and suggest that you send somebody down to check with the Circuit Clerk's office to be sure about that. I don't think that either one of you wants to mislead the Jury.

WHEREUPON, Court was declared to be in recess at approximately 2:30 p.m. and the Jury retired to the jury room and Court continued as follows:)

THE COURT: Jurors, I'm going to have to ask you to retire to the jury room.

[1485] MR. JEWELL: Why don't you make your objection again?

MR. JASMIN: Your Honor, the Commonwealth feels that one of the reasons for calling this witness is to get information with reference to what it feels like to be on death row. The Commonwealth recognizes that fact that the possibility of rehabilitation is an issue in this case. The Commonwealth's position, however, is that we're only talking about rehabilitation and its possibilities as it relates to the defendant here on trial, Kevin Stanford, himself. We're not talking in terms of what has happened to other folk who might have been on death row or the situation in general.

THE COURT: Well, you're on death row after you have gotten the death penalty. Who are we to make a judgment as to what it feels like to be on death row. It's obviously not a part of it, not whether you should be on death row but how you should feel.

MR. JEWELL: Your Honor, I think that we should be allowed to develop, through Mr. Jones, that he, in fact, did receive the death sentence; that he did spend time on death row and I think the Jury has a right to know what they're being asked to do by giving this death penalty. They have a right to know that, Judge, still as we look at KRS . . .

THE COURT: Are you objecting to [1486] the relevancy of this coming in?

MR. JASMIN: Yes, Judge.

THE COURT: Well, I'm sustaining that objection. Can you get it in by avowal?

MR. JEWELL: About capital punishment based only on his opinion that, again the death penalty should . . .

THE COURT: You mean his philosophical opinion of whether the death penalty should be rendered?

MR. JEWELL: With his knowledge of Kevin Stanford.

THE COURT: The law says that the death penalty is legal. His position is that it should not be given. If that is his opinion that the death penalty should be outlawed, then I don't see . . .

MR. JEWELL: It will always be related why it's not appealing to him.

THE COURT: My mind's thinking is that I will sustain the objection to all of it. I will suggest that you call him and make an avowal.

MR. JEWELL: As to whether he thinks it's appropriate for Kevin Stanford?

THE COURT: Yeah. I don't think that Robert Jones has any . . . as a matter of fact, I have a lot of reservations, just because he's had a lot of [1487] personal experience with the criminal justice system by virtue (sic) of the fact that he has been sentence to the death penalty and did spend time on death row, I don't think that qualified to speak on the subject.

MR. JEWELL: Your Honor, the other thing that's important is his specific work with juveniles. He has done work with Kevin, he has spend an amount of time with Kevin.

THE COURT: As I say, you can call him in and make him an avowal witness. If I hear anything in the avowal that makes me want to change my mind about, I will, but my reaction is to sustain objections to the entire line of questioning about that man's opinion about the subject. I don't know that he's qualified to express any opinions.

MR. JEWELL: We'd like to make an avowal on that before the Jury comes back, your Honor.

THE COURT: Okay. Bring him in and we'll make an avowal.

AVOWAL TESTIMONY GIVEN BY MR. ROBERT JONES:

QUESTIONS ASKED BY MR. JEWELL:

1 Q State your name, please?

A Robert Jones.

2 Q Okay. Where do you live, Mr. Jones?

A 535 Southwestern Parkway.

[1488] 3 Q Where are you employed, at this time, Mr. Jones?

A I'm a supervisor for the Mayor's Summer Youth Program.

4 Q Have you worked in other positions with juveniles and with young people?

A Yes, sir.

5 Q What positions were they, please?

A I was Assistant Director of the Juvenile Crime Program at the Urban House. I was a youth counselor at Children's Center. And, also, I was counselor at the inmates grievances and mechanism at the county jail.

6 Q How long have you worked in juvenile programs and with juveniles?

A Since 1975.

7 Q Okay. Do you hold any positions in any organizations dealing with the death penalty?

A I am the Vice-Chairman of the Kentucky Coalition against the death penalty.

THE COURT: The Kentucky what, sir?

THE WITNESS: With the Kentucky national alliance.

THE COURT: I'm sorry, I just didn't hear the full title of the association or whatever.

THE WITNESS: Okay, I said that the . . .

THE COURT: Vice-Chairman of what?

[1489] THE WITNESS: Of the Kentucky Coalition against the death penalty in the State of Kentucky.

THE COURT: Coalition?

THE WITNESS: Yes, sir.

THE COURT: Okay.

QUESTIONS CONTINUED BY MR. JEWELL:

8 Q And, what do your duties include in that area, sir?

A Part of my duties is to gather information as much as I possibly can concerning death penalty. I go to different states speaking out against capital punishment. A few months ago, I was in Washington, D.C. at a workshop concerning the death penalty.

9 Q Where all have you spoken in regards to the death penalty?

A I've spoken at many of the churches here in Louisville. I've spoken at the University of Kentucky. I spoke at Kentucky State. I spoke at University of Kentucky. I just got back from speaking at Southside High School in Huntingburg, Indiana. I also spoke at Daus

High School. And, also I spoke against capital punishment before the Kentucky House of Representatives in Frankfort, Kentucky.

10 Q Have you ever testified in a court of law in a death penalty case relating to your opinion as to the death penalty and its appropriateness (sic) in that case?

A Yes, sir.

[1490]11 Q Where did you so testify?

A Here in Louisville. I forget what Judge's court I was in but it happened about one year or two years ago.

12 Q Was that the Commonwealth versus Marvin Lewis?

A I'm not for sure.

13 Q Okay. And, sir, could you tell me your unique relationship with the death penalty?

A Well one of the problems that I see with the death penalty . . .

14 Q No, your relationship.

A My relationship.

15 Q How come you became interested in it and how come you know so much about it?

A Well, at one time, I was on death row myself.

16 Q When were you on death row?

A In 1961 and I was sentence to die on March 2nd, 1962 along with Kelly Moth, which he was the last man who was executed in this state.

17 Q Okay, now, sir, you are familiar, are you not, with Kevin Stanford?

A Yes, sir.

18 Q How are you familiar with Kevin Stanford?

A While I was working as a youth counselor at Children's Center, that's where I became acquainted [1491] with Mr. Kevin Stanford.

THE COURT: What was the time frame of your work, Mr. Jones?

MR. JONES: Sir?

THE COURT: What was the time framework, what year?

MR. JONES: '78 and '79.

QUESTIONS CONTINUED BY MR. JEWELL:

19 Q Have you spoken to him at any time since then?

A Yes, sir.

20 Q Did you speak to him at my request?

A Yes, sir.

21 Q When was this?

A Since he came back from Eddyville.

22 Q That was?

A Last week.

23 Q Within the month, correct?

A Yes, sir.

24 Q Okay. Now, Mr. Jones, I want to know your impression, based upon your working at the center, your conversations with Kevin, what problems you think he has that must be addressed and whether or not these can be addressed in the penal system?

A First thing, from my knowledge of Kevin, I feel that the adult institution probably is the proper [1492] place for Kevin to be. I feel that there is a lot of difference between juvenile facilities than there is in an adult facility.

25 Q Okay. You're aware that he's been at the juvenile facilities?

A Yes, sir. I feel that Kevin need to be in an adult institution where the rehabilitation program and the proper training is a lots greater than it is in the juvenile facilities. I think that Kevin need discipline. I think that that Kevin's biggest problem is the lack of discipline in his life as a youth. And, I truly feel that there is some other alternative besides executing 17, 18 year old boys.

26 Q Do you feel that. why do you feel that that penalty would not be appropriate for him?

A Sir, I truly feel that the death penalty is not appropriate for anyone I guess because of my own personal experience that I've had. I am against capital punishment 1000% and I realize that even if Kevin was guilty of the crime, it's not going to bring the victim back. I feel that with his young age, that this man can be rehabilitated. And, if a 17 or 18 year old cannot be rehabilitated, then this is a failure in our correction department instead

of the individual. I said the same thing when they executed Judy over in Indiana. Even when I was in Washington, D.C., Coretta King, Martin [1493] Luther King's wife, she spoke out against capital punishment. Just like she said, her husband was assassinated, yet, they did not ask for the death penalty because they was against it. Her mother-in-law was assassinated and yet, they still oppose capital punishment. I know there's some type of peoples brings it up they comes up with the theory that the Bible says and eye for an eye. Well, like for Coretta Kings, says, if we had to live by that law, eye for an eye, we all would be blind today. I do not really understand our criminologies and our penologist and our of our socialologist, (sic) when we say that the only thing that we have to do to a 17 or 18 year old is to execute him. I feel that we have some other alternatuve (sic). I feel that this young man should be given this opportunity to place him in the Department of Corrections with the proper type of counseling. Now, I've heard that Kevin had a drug problem. There's no difference between a drug problem and an alcoholic problem. Either one that you use, it will give you artifical nerve. I'm really saying if this man is guilty, would he have committed the same identical acts if he was not on drugs or if he was not on alcohol? I am saying this from my own experience. I got into trouble because I would take me some drinks. I never used any drugs but I would take me some drinks to give me artifical nerve to do different things. And, this is still [1494] happening with the young people today.

27 Q Now, getting to Kevin, himself, Mr. Jones, from working with him and from your later discussion with

him, do you feel that Kevin is an individual that can be controled in the Department of Corrections?

A I can almost guarantee he will be controlled. There is no ands, if, Tom, Dick or Harry about that, Mr. Kevin will be controlled. I think when they send him to Eddyville to be down there for safe keeping for how long, or whatever, he should have been put out there in the population those days. Kevin would have been a brand new man right now. And, I'm saying that's where the system is a failure at. They give you . . . they call theirself giving you protection when they should have gone out there and exposed you to it.

28 Q Do you think being in the penal population and being with the population in a penal system will affect Kevin?

A Mentally, yes, sir.

29 Q How will it affect him?

A I feel that Eddyville will make him or break him. And, I feel with the type of program that they have at Eddyville that he'd never been exposed to in a juvenile facility, that this is another thing, he would have an opportunity to get a GED; he'd have an opportunity to get him a college education; he'd have an opportunity to [1495] get into so many type of vocational training and I think that this is what Kevin needs.

30 Q Okay. Now, sir, let me ask you another question about the death penalty; in connection with your studies of it; in connection with your position with the Kentucky Coalition and your lecturing, do you believe that the death penalty is a deterrent?

A No, sir, No, sir. I do not.

31 Q Can you expand on that?

A Well, this is the same thing . . .

THE COURT: Counselor, in the interest of time, it might be that he could write a book on it.

MR. JEWELL: Your Honor, I want to get his whole testimony on by avowal since we can't have it in front of a Jury.

THE COURT: All right. That's a mighty big invitation when you say can you expand on the theory of penology.

MR. JEWELL: I understand that, Judge.

THE COURT: Can you say in three minutes or less or something like that?

MR. JEWELL: Try and keep it to three minutes, Mr. Jones.

A Could you repeat you question, counselor?

[1486] THE COURT: He wants you to expand on why you do not thing (sic) the death penalty is a deterrent?

A Well, this is the same thing that I said when WAVE called me one day, when they executed Gary Gilmore. They asked me did I think that this would stop crime? Since they have executed Gilmore, crime have not stand still, stood still; crime have not stopped; crimes has continued to go up and killing people have never stopped crime. Jesus Christ killed people everyday and

they still committing crime. How in the world, can a man kill another man and that's going to stop crime? Really, I don't feel that no man is fit to sit up and take another man's life no matter who he is, under what law. To give a man \$100 to take a kid's life? That man is just as guilty as the defendant sitting there at the table. And, as I said before, executing a man in the gas chamber; putting a man in the gas chamber; putting a man before a firing squad will not stop crime and it has never stopped crime. And, we can go all the way back to our biblical days.

32 Q Do you think that the penal system . . . well, I'll withdraw that, we've asked that. Do you believe that Kevin Stanford, based on your experience with him and your discussions with him, is mature in his actions?

[1497] A No, sir. From talking to Stanford here, the other week, he really do not have, to me, the mentality to really realize the seriousness, although, he realize he has done wrong. But, I think there's more to it than to just realize I've done wrong. I don't think that it really has affected him to the extent that he really realizes the consequences. And, I've seen guys, from my own experience, that maybe get a life sentence in prison, and they may stay in there maybe six months to a year, before they realize, before it hit their minds that they got a life sentence to serve. And, I think Kevin is in this, he may have committed a crime but I just don't think that it really affecting him, the real seriousness of the crime that he's accused of today.

33 Q Do you think a life sentence would wake him up to that fact?

A The life sentence is going to wake him up and the maximum security environment will wake him up.

MR. JEWELL: Okay, thank you, Mr. Jones.

THE COURT: We think (sic) you very much, Mr. Jones, you're free to leave.

MR. JONES: Thank you, sir.

MR. JEWELL: May we approach the bench, your Honor?

[1498] THE COURT: Yes, sir.

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. JEWELL: Can you ask him to wait in the hall?

THE COURT: You can retire to the hall, sir, in the event that you are called to testify in front of the Jury.

MR. JONES: Yes, sir.

MR. JASMIN: Your Honor, the Commonwealth is going to object on the basis that there is no basis for allowing a person to testify about his personal experience and personal opinions.

THE COURT: Right. I sustain the Commonwealth's objection.

MR. JEWELL: Your Honor, I would then ask that he be allowed to testify as to his opinion of Kevin Stanford and what his needs are, the man has worked with juveniles for over seven years.

THE COURT: I don't know that. He didn't state that at all.

MR. JEWELL: He said he had worked with juveniles for over seven years, for the Mayor's Summer Youth Program and as a counselor for the various programs of the state.

THE COURT: He may have spent that much time on the payroll, the only thing he has said as far as I know is that he has not had any training. I don't know what a counselor needs. There's been no showing that he's a social worker or psychologist or anything [1499] of the nature that relates that he's had any courses of any kind that would entitle him to express an opinion about whether this young man is rehabilitative or not. You have had a number of people who are social workers and who are psychologist, for example, Miss Luking and Mr. Matison and some other people I believe. First of all, I don't know that he's qualified by any evidence that's been presented so far. Second of all, I rule that the evidence would be merely cumulative, at best.

MR. JEWELL: Your Honor, I don't want to be arguing with the Court but the man . . .

THE COURT: Well, you can be arguing all you want. It won't do you any good.

MR. JEWELL: You know, the man testified, Judge, he was a counselor at the Children's Center for Jefferson County and for the Urban House. He is experienced in juvenile problems, he is supervisor for the Children's Center right now.

THE COURT: Director of Coalition of something.

MR. JEWELL: Supervisor with the Mayor's Summer Youth Program, he testified that he was the director of juvenile crime program at the Urban House and he was a counselor at the detention center and I would think that would qualify a man on his past for working with youth and he has testified that he has worked with this young man.

THE COURT: I don't think . . . well, I don't know how much he's worked with . . .

[1500] MR. JEWELL: He just talked to him last week.

THE COURT: Talked to him last week.

MR. JEWELL: And he worked with him in '78 and '79.

MR. JASMIN: How long in '79? He did not bring up how long in '78 or '79. But, he did bring out that, at Mr. Jewell's request he talked to Stanford last week. He apparently went to the jail, Judge, and talked to him. We have nothing to show what this man credentials are.

THE COURT: So, I'm going to sustain the objection.

MR. JEWELL: Mr. Jones cannot testify as to any matters in this case?

THE COURT: I'm ruling that . . . I rule that all of what he testified to so far is in by avowal and that it will be precluded from testifying before the Jury. That's all I can deal with.

MR. JEWELL: Your Honor, we'll have to rest at this point.

* * * * *

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

PROPOSED INSTRUCTIONS FOR PENALTY PHASE

* * *

INSTRUCTION NO.

INSTRUCTION AT BEGINNING OF HEARING

Ladies and gentlemen of the jury, you have tried the defendant and returned a verdict finding him guilty of Murder, _____. From the evidence placed before you in that trial you are acquainted with the facts and circumstances of the crime itself. You will now receive additional evidence from which you shall determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, following which you shall recommend a sentence for the defendant. In considering such evidence you will bear in mind the same instruction that was given to you in the first stage of this trial proceeding, to the effect that the law presumes the defendant innocent unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty, and you shall apply that same presumption in determining whether there are aggravating circumstances bearing on the question of what punishment should be adjudged against him in this case. You are also instructed that even if you believe that the aggravating circumstances alleged have been proven beyond a reasonable doubt you may still nevertheless in your discretion recommend a sentence other than death. A finding that the aggravating factors do exist does not mean that you must give the death penalty to Kevin N. Stanford. The question of whether Kevin N. Stanford is put to

death is left in your discretion. In order to recommend the death sentence you must believe that at least one of the aggravating factors do exist beyond a reasonable doubt. However, you are not required to make any such specific findings if you return a verdict of punishment of a term of 20 years or more in the penitentiary or for a term of life in the penitentiary. You must consider all the evidence which is presented to you in this hearing. You do not have to make a unanimous finding of fact on any of the evidence unless you are recommending the death penalty in which you must unanimously find that one or more of the aggravating factors have been proven beyond a reasonable doubt and must unanimously agree on that punishment.

As with the trial in chief, the burden of proof herein lies with the prosecutor. The defendant is not required to testify and you cannot hold it against him if he chooses not to testify.

Pursuant to the verdict returned by you finding the defendant guilty of Murder, and under the evidence presented to you in both stages of this trial proceeding you shall recommend to the Court at the conclusion of your deliberations after this hearing one of the following three verdicts:

1. A term of 20 years or more in the penitentiary;
 2. A term of life imprisonment in the penitentiary;
- OR
3. Death by electrocution.
-

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

*DEFENDANT'S PROPOSED INSTRUCTIONS
AT END OF PENALTY PHASE*

* * *

Under the evidence presented to you in both stages of this trial proceeding you should recommend to the Court one of the following three verdicts:

1. A term of 20 years or more in the penitentiary;
 2. A term of life imprisonment in the penitentiary;
- OR
3. Death by electrocution.

AGGRAVATING CIRCUMSTANCES

In recommending a sentence for the defendant you shall consider such of the following, if any, as you believe from the evidence beyond a reasonable doubt to be true:

- a. That the offense of murder was committed while the offender was engaged in the commission of robbery in the first degree;
- b. That the offense of murder was committed while the offender was engaged in the commission of sodomy in the first degree.

MITIGATING CIRCUMSTANCES

In recommending a sentence for the defendant you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to such as the following as you believe from the evidence to be true:

a. That at the time of the offense Kevin Stanford was of a very youthful age in light of the fact that he was only 17 years old.

b. That at the time of the offense the capacity of Kevin Stanford to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, even though the impairment of the capacity of Kevin Stanford to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was insufficient to constitute a defense to the crime.

c. That at the time of the offense the capacity of Kevin Stanford to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of intoxication by alcohol and/or drugs.

d. That the offense was committed while Kevin Stanford was under the influence of extreme mental or emotional disturbance even though the influence of such extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime.

e. That the circumstances surrounding the entire incident left the defendant acting under duress, even

though such duress is not sufficient to constitute a defense to the crime.

f. That Kevin Stanford was led into the crime by another person even though the domination of the other person was not sufficient to constitute a defense to the crime.

g. That Kevin Stanford is emotionally immature.

h. Kevin Stanford is not a leader but is a follower of other people's actions.

i. That Kevin Stanford is capable of being rehabilitated.

j. That Kevin Stanford has had a long standing drug problem which has influenced his behavior.

k. That Kevin Stanford still suffers from emotional neglect as a young child.

l. That Kevin Stanford has been unable to develop sufficient loving relationships in his youth or later life.

m. That Kevin Stanford as a young child was unable to establish sufficient bonding relationships.

n. That Kevin Stanford is in need of long term psychotherapeutic intervention.

o. That Kevin Stanford is further in need of reality based therapy for socialization purposes.

p. Kevin Stanford could benefit from drug therapy available in the Department of Corrections.

q. That Kevin Stanford has not had meaningful or appropriate therapeutic intervention as of yet.

r. That Kevin Stanford presently has a small child whom he loves very much.

s. That because of his age Kevin Stanford is capable of changing and of benefiting from rehabilitative programs.

t. Kentucky Department of Corrections has rehabilitative programs which could be made available to Kevin Stanford.

AUTHORIZED SENTENCES

You may recommend that the defendant be sentenced to:

a. Confinement in the penitentiary for a term of 20 years or more;

b. Confinement in the penitentiary for life

OR

c. Death by electrocution in your discretion.

You cannot recommend that he be sentenced to death unless you are satisfied from the evidence beyond a reasonable doubt that at least one of the statements listed in Instruction ___, Aggravating Circumstances is true in its entirety, in which event you must designate in writing, signed by the foreman, which of the aggravating circumstances you found beyond a reasonable doubt.

You are further instructed that a sentence of life or term of 20 years imprisonment or more can be returned even if you believe the number of aggravating circumstances are greater than the number of mitigating circumstances, or even if you believe that no mitigating circumstances exist.

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

DEFENDANT'S PROPOSED INSTRUCTIONS AT END OF PENALTY PHASE

* * *

INSTRUCTION NO.

REASONABLE DOUBT

If you have a reasonable doubt as to the truth or existence of any one of the aggravating circumstances you shall not make a finding with respect to it. If upon the whole case you have a reasonable doubt as to whether the defendant should be sentenced to death you shall recommend a sentence of imprisonment instead. Even if you believe the aggravating circumstances exist beyond a reasonable doubt you are not bound to return a finding of death. You are free in your discretion to give Kevin Stanford the benefit of life in prison or imprisonment of not less than 20 years in your discretion. A return of a sentence of imprisonment does not require any finding by you concerning any mitigating circumstances but may be made solely in your discretion. You are further instructed that Kevin Stanford is not required to testify in the penalty phase hearing. His election not to testify cannot be construed as having any weight against him, nor shall you consider that fact against him.

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

DEFENDANT'S PROPOSED INSTRUCTIONS
AT END OF PENALTY PHASE

* * *

INSTRUCTION NO.

UNANIMOUS VERDICT

The verdict must be unanimous and signed by one of you as foreman. If you make the recommendation of death, you must also be unanimous in your finding of the aggravating circumstances.

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

VERDICT FORMS

* * *

A. TERMS OF YEARS

We the jury recommend that the defendant, Kevin N. Stanford, be sentenced to confinement in the penitentiary for a term of _____ years.

FOREMAN

B. LIFE IMPRISONMENT

We the jury recommend that the defendant, Kevin N. Stanford, be sentenced to confinement in the penitentiary for life.

FOREMAN

C. DEATH

We the jury recommend that the defendant, Kevin N. Stanford, be sentenced to death by electrocution.

FOREMAN

We the jury further find the following aggravating circumstance to be true: _____ .

We the Jury also find that the following mitigating factors existed (you may refer to the mitigating factors by the letter designation given in the instruction) _____ .

We the jury further find that these mitigating factors do not exist (you may refer to the mitigating factors by the letter designation given in the instruction) _____ .

FOREMAN

NO. 82CR0406

JEFFERSON CIRCUIT COURT
NINTH DIVISION

(title omitted in printing)

JURY INSTRUCTIONS
* * *

Ladies and Gentlemen of the Jury:

You have tried the defendant, Kevin Stanford, and have returned a verdict finding him guilty of murder. From the evidence placed before you in that trial you are acquainted with the facts and circumstances of the crime itself. You will now receive additional evidence from which you shall determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, following which you shall recommend a sentence for the defendant. In considering such evidence as may be unfavorable to the defendant, you will bear in mind the same instruction that was given to you in the first stage of this trial proceeding, to the effect that the law presumes a defendant innocent unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty, and you shall apply that same presumption in determining whether there are aggravating circumstances bearing on the question of what punishment should be adjudged against him in this case.

Pursuant to the verdict returned by you finding the defendant guilty of murder, and under the evidence presented to you in both stages of this trial proceeding, you shall recommend to the court in your discretion one of the following three verdicts:

- (1) A term of twenty (20) years or more in the penitentiary;
 - (2) A term of life imprisonment in the penitentiary;
- OR
- (3) Death.

INSTRUCTION NO. I - AGGRAVATING CIRCUMSTANCES

In recommending a sentence for the defendant you shall consider such of the following as you believe from the evidence beyond a reasonable doubt to be true:

- (a) That at the time he killed Baerbel Poore the defendant was engaged in a robbery of Cheker Oil Station, 4501 Cane Run Road, and that in the course of so doing and with intent to accomplish the robbery in the first degree he was armed with a pistol;

OR

- (b) That at the time he killed Baerbel Poore the defendant was engaged in deviate sexual intercourse with Baerbel Poore and that he did so by forcible compulsion.

INSTRUCTION NO. II - MITIGATING CIRCUMSTANCES

In recommending a sentence for the defendant you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true:

a. That at the time of the offense Kevin Stanford was of a very youthful age in light of the fact that he was only 17 years old.

b. That at the time of the offense the capacity of Kevin Stanford to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, even though the impairment of the capacity of Kevin Stanford to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was insufficient to constitute a defense to the crime.

c. That at the time of the offense the capacity of Kevin Stanford to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of intoxication by alcohol and/or drugs.

d. That the offense was committed while Kevin Stanford was under the influence of extreme mental or emotional disturbance even though the influence of such extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime.

e. That the circumstances surrounding the entire incident left the defendant acting under duress, even though such duress is not sufficient to constitute a defense to the crime.

f. That Kevin Stanford was led into the crime by another person even though the domination of the other person was not sufficient to constitute a defense to the crime.

g. That Kevin Stanford is emotionally immature.

h. That Kevin Stanford is not a leader but is a follower of other people's actions.

i. That Kevin Stanford is capable of being rehabilitated.

j. That Kevin Stanford has had a long standing drug problem which has influenced his behavior.

k. That Kevin Stanford still suffers from emotional neglect as a young child.

l. That Kevin Stanford has been unable to develop sufficient loving relationships in his youth or later life.

m. That Kevin Stanford as a young child was unable to establish sufficient bonding relationships.

n. That Kevin Stanford is in need of long term psychotherapeutic intervention.

o. That Kevin Stanford is further in need of reality based therapy for socialization purposes.

p. That Kevin Stanford could benefit from drug therapy available in the Department of Corrections.

q. That Kevin Stanford has not had meaningful or appropriate therapeutic intervention as of yet.

r. That Kevin Stanford presently has a small child whom he loves very much.

s. That because of his age Kevin Stanford is capable of changing and of benefiting from rehabilitative programs.

t. That Kentucky Department of Corrections has rehabilitative programs which could be made available to Kevin Stanford.

In addition to the foregoing, you shall consider also those aspects of the defendant's character and record, and those facts and circumstances of the particular offense of which you have found him guilty, about which he has offered evidence in mitigation of the penalty to be imposed upon him and which you believe from the evidence to be true.

INSTRUCTION NO. III - AUTHORIZED SENTENCES

You may recommend that the defendant be sentenced (a) to confinement in the penitentiary for a term of twenty (20) years or more; (b) to confinement in the penitentiary for life; or (c) to death, in your discretion, but you cannot recommend that he be sentenced to death unless you are satisfied from the evidence beyond a reasonable doubt that at least one of the statements listed as (a) and (b) in Instruction No. I (Aggravating Circumstances) is true in its entirety, in which event you must designate in writing, signed by the foreman, which of the aggravating circumstances you found beyond a reasonable doubt to be true.

You are further instructed that a sentence of life or term of twenty (20) years imprisonment or more can be returned even if you believe the number of aggravating circumstances are greater than the number of mitigating circumstances, or even if you believe that no mitigating circumstances exist.

INSTRUCTION NO. IV - REASONABLE DOUBT

- (a) If you have a reasonable doubt as to the truth or existence of any one of the "aggravating circumstances" listed in instruction No. I, you shall not make any finding with respect to it.
- (b) If upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall recommend a sentence of imprisonment instead.

INSTRUCTION NO. V - UNANIMOUS VERDICT

The verdict must be unanimous and signed by one of you as foreman. If you make the recommendation of death, you must also be unanimous in your finding of the aggravating circumstances.

/s/ Charles M. Leibson
Aug 12 - 1982

To be completed if the sentence is death:

We, the Jury, find the following to be true: (Enter a statement of one or more of the circumstances listed in Instruction No. ____).

That at the time he killed Baerbel Poore the defendant was engaged in a robbery of Cheker Oil Station, 4501 Cane Run Road, and that in the course of so doing and with intent to accomplish the robbery in the first degree he was armed with a pistol and that at the time he killed Baerbel Poore the defendant was engaged in deviate sexual intercourse with Baerbel Poore and that he did so by forcible compulsion.

[The foregoing is a handwritten notation of the jury
forman.]

(s) Charles B. Cornish
FOREMAN

We, the Jury, recommend that the defendant, Kevin
Stanford, be sentenced to death.

(s) Charles B. Cornish
FOREMAN

August 13, 1982
Date

[Verdict Forms - Reprinted from Original]

[Backside of Verdict Forms - TR 82CR0406, 314]

(Roll call vote on the verdict of punishment on 11:44
a.m.

August 13, 1982 - Death Penalty).

Alice Eichenberger
Mary Ellen Mitchell
Donald L. Romans
Hazel Miles
Robert Sands
Charles Kelly
Franklin N. Sabol
Darren Adkins
Donald M. Black
Ethel V. Zimmerer
Charles B. Cornish
Mary Ann Quaife

[The foregoing is a handwritten roll call vote that was
signed by each juror.]

*[Roll Call Vote and Signatures of Jurors - Reprinted from
Original]*

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

(title omitted in printing)

NOTICE-MOTION-ORDER

Notice Clause Omitted in Printing

MOTION TO REDUCE SENTENCE
OF DEATH TO LIFE IMPRISONMENT
OR A TERM OF YEARS

Comes the defendant, by counsel, under KRS
532.025(1)(b) and *Smith v. Commonwealth, Ky.*, 634 S.W.2d
411 (1982) and moves this Court to enter a sentence of life
imprisonment or a term of years not less than twenty (20)
years. In support of this motion the defendant notes the
following:

1. A recommendation of death by the jury is not
binding upon the trial judge. *Smith v. Commonwealth, Ky.*,
634 S.W.2d 411 (1982).

2. The Court may in its discretion sentence the
defendant to a term of years not less than twenty (20) or
to life imprisonment.

3. The recommendation of the jury in this case was
not and should not be construed as a voice of the total
community. The defendant had previously moved not to
death qualify the jurors as it deprived him of a valid
cross-section of the community but was overruled on this
point, therefore the jury which tried Kevin Stanford was
composed of only those members of the community who
believed in the imposition of the death penalty. Therefore

their recommendation cannot be taken as a recommendation of the entire community, a large segment of which does not believe in the imposition of the death penalty.

4. With the alternative of lengthy incarceration up to and including life in the penitentiary there is no valid reason that Kevin Stanford must die while his co-defendant who was also found guilty under an intentional murder instruction is allowed to live.

5. The application of the death penalty in this case would be capricious and arbitrary when compared to other cases involving possible death sentences.

6. The defendant is still a very young man, these crimes having occurred when he was age 17. Therefore the defendant could have a great number of years in which he could be rehabilitated, including years that are usually ones of change in many people.

7. A person as young as Kevin Stanford should not be considered so far beyond redemption that the only alternative left to a civilized society is to put him to death.

8. The death penalty historically has been, and still is, applied in a capricious fashion which results in discrimination based upon both class and race. An example is seen in the State of Kentucky in that between 1911 and 1962-170 persons were executed in the State of Kentucky and 92 of these persons, or roughly 53% were black. These statistics were gathered by the Kentucky Office of Public Advocacy from records of statistics kept by the Department of Corrections. As of June 20, 1982 over 42% of the prison death row population in this country were

black according to statistics gathered by the NAACP Legal Defense Fund.

9. The sentence of death is so cruel and unusual that according to statistics gathered by the NAACP Legal Defense Fund since January 1 of 1973 the number of suicides on death row have exceeded the number of executions in this country. According to the statistics since January 1, 1973 up through June 20, 1982 there were 4 executions and 8 suicides of persons under the death sentence.

And

10. In light of Kevin Stanford's age, in light of the fact that only he was ruled eligible for the death penalty of three persons charged with the same offense, in light of the cruelty of the death penalty, and in light of the mercy with which this Court should govern it is requested that Kevin Stanford's life be spared by this Court and the order tendered herewith signed by the Court.

WHEREFORE, the defendant moves this Court to enter the attached order reducing the sentence of Kevin Stanford from death to prison sentence in the discretion of this court.

Certificate of Service Omitted in Printing
UNSIGNED, TENDERED ORDER
OMITTED IN PRINTING

NO. 81 CR 1218 JEFFERSON CIRCUIT COURT
82 CR 0406 NINTH DIVISION

(title omitted in printing)

FINAL JUDGMENT

The defendant at arraignment having entered a plea of not guilty to the following charges included within the indictment; Count 1, Murder, Count 2, Robbery I, Count 4, sodomy I and Count 5, Receiving Stolen Property Over \$100.00 and having on the 2nd day August, 1982, appeared in open court with his attorney the case was tried before a jury which returned the following verdict on the 12th day of August, 1982: VERDICT NO. 2, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF MURDER - INTENTIONAL UNDER INSTRUCTION NO. 1. /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 8, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF ROBBERY IN THE FIRST DEGREE UNDER INSTRUCTION NO. IV AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS, (CONSECUT SENTENCE WITH ANY OTHER PRISON SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN, VERDICT NO. 10 WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF SODOMY IN THE FIRST DEGREE UNDER INSTRUCTION NO. V AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS, (CONSECUTIVELY TO BE SERVED WITH ANY OTHER SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 12, WE, THE JURY, FIND THE DEFENDANT, KEVIN STANFORD, GUILTY OF RECEIVING

STOLEN PROPERTY OVER \$100.00 UNDER INSTRUCTION NO. VI AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 5 YEARS, (CONSECUTIVELY SERVED). /S/ CHARLES B. CORNISH, FOREMAN.

After the jury returned the above verdicts on the defendant the court informed the jury of another phase of trial that they needed to proceed with, that being the Death Penalty Phase. All evidence having been heard for this part of the trial, the jury returned in open court with the following verdict: WE, THE JURY, FIND THE FOLLOWING TO BE TRUE: THAT AT THE TIME HE KILLED BAERBEL POORE THE DEFENDANT WAS ENGAGED IN A ROBBERY OF CHECKER OIL STATION, 4501 CANE RUN ROAD AND THAT IN THE COURSE OF SO DOING AND WITH INTENT TO ACCOMPLISH THE ROBBERY IN THE FIRST DEGREE HE WAS ARMED WITH A PISTOL; AND THAT AT THE TIME HE KILLED BAERBEL POORE THE DEFENDANT WAS ENGAGED IN DEVIATE SEXUAL INTERCOURSE WITH BAERBEL POORE AND THAT HE DID SO BY FORCIBLE COM-PULSION. /S/ CHARLES B. CORNISH, FOREMAN. WE, THE JURY, RECOMMEND THAT THE DEFENDANT, KEVIN STANFORD, BE SENTENCED TO DEATH. /S/ CHARLES B. CORNISH, FOREMAN.

At a hearing held on August 31, 1982, the defendant, in person and by counsel made a motion for a new trial and judgment notwithstanding the verdict, evidence being heard the Court being sufficiently advised hereby ORDERS that the motion be and hereby is overruled.

On the 24th day of September, 1982, the defendant appeared in open court with his attorney, Frank Jewell and Jim Shake, and the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents of said report with the exceptional (sic) of the official version which the defendant denies.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because:

- A. there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge.
- B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.
- C. probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced, IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that the

defendant is guilty of Count 2, Robbery in the First Degree, and is sentenced to 20 years in the penitentiary; on County 4, Sodomy in the First Degree, the defendant is sentenced to 20 years in the penitentiary; on Count 5, Receiving Stolen Property Over \$100.00, the defendant is sentenced to 5 years in the penitentiary. These three sentences are ORDERED served Consecutively for a total of 45 years in the penitentiary.

From the circumstances of the present crime and the history of Kevin Stanford, the Court concludes that the defendant, Kevin Stanford is beyond rehabilitation. There is no reasonable possibility that he could be rehabilitated by any type of program, with or without lengthy incarceration. Therefore, the death penalty will be imposed.

On Count 1 of the indictment, Murder, the jury has recommended a death sentence. In the circumstances of this case, no other sentence would be appropriate. Therefore, the motion to reduce the sentence of death to life in prison or term of years, is denied.

The defendant, Kevin Stanford, on Count 1 of the indictment, the charge of Murder, is sentenced to death.

The defendant shall be taken by the Sheriff of Jefferson County and committed to the custody of the Department of Corrections, to be held as such location as the Department shall designate. This Court is required by Criminal Rule 11.04 to set a day for the execution of the death sentence, which shall be on Friday, October 29, 1982.

Pursuant to KRS 431. 220, the death sentence shall be executed by causing to pass through the body of the defendant, Kevin Stanford, a current of electricity of sufficient intensity to cause death as quickly as possible. The

application of the current shall be continued until the defendant is dead.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is hereby credited with time spent in custody prior to sentence, namely 343 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an appeal a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Defendant having made a motion to proceed with appeal in forma pauperis, the court being duly advised hereby sustains said motion.

The defendant further made a motion to stay execution of death sentence pending appeal to the Kentucky Supreme Court, and the court being duly advised sustains said motion.

The defendant, Kevin Stanford is remanded to custody without bond pending appeal.

/s/ Charles M. Leibson
CHARLES M. LEIBSON,
JUDGE

September 28, 1982

SUPREME COURT OF KENTUCKY

83-SC-65-MR

83-SC-66-MR

KEVIN N. STANFORD

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HONORABLE CHARLES M. LEIBSON, JUDGE
ACTION NOS. 81-CR-1218 & 82-CR-0406

COMMONWEALTH OF KENTUCKY

APPELLEE

April 30, 1987

Kevin Stanford appeals from his sentence of death imposed by the Jefferson Circuit Court following a jury trial in which he was found guilty of murder, first-degree sodomy, first-degree robbery, and receiving stolen property over \$100. The appellant, a 17-year-old juvenile at the time of his criminal deeds, raises numerous issues in his appeal: some are preserved, others are not. As this Court announced in *Ice v. Commonwealth*, Ky., 667 S.W.2d 671, 674 (1984), all prejudicial errors "must be considered, whether or not an objection was made in the trial court." Therefore, this opinion will concern itself only with the merits of the appellant's arguments and will not disregard claim of error for lack of objection unless it is apparent that the failure to object was a deliberate trial tactic.

On the evening of January 7, 1981, Barbel Poore was repeatedly raped and sodomized during and after the commission of a robbery at the Cheker gasoline station on Cane Run Road in southwestern Jefferson County where she was employed as an attendant. The proceeds of the robbery consisted of approximately 300 cartons of cigarettes, two gallons of fuel and a small amount of cash.

Following the robbery Ms. Poore was taken from the station and driven a short distance to an isolated area where she was shot twice, once in the face and once, fatally, in the head.

Based upon information obtained from a juvenile reported to be selling cigarettes and from rumors at the apartment complex near the scene of the crime where appellant resided, the police arrested Stanford on January 13, 1981. Stanford gave the police a statement, subsequently suppressed, which implicated Calvin Buchanan as the major wrongdoer in the commission of these crimes. Calvin, having no desire to return to prison from where he had recently been paroled, denied any participation in the crimes and allowed the police to tape record a conversation with his nephew, David Buchanan. During that conversation, David exonerated Calvin while admitting his involvement and that of the appellant in the crimes. David Buchanan was arrested on January 16, 1981. Following his arrest he gave the police a statement in which he confessed to rape, sodomy and robbery, and implicated Stanford as the triggerman and perpetrator of the crimes. He also implicated a third juvenile, Troy Johnson, who supplied and drove the getaway vehicle and who obtained the gun used by Stanford in the murder.

In October, 1981, following a waiver hearing, the Jefferson District Court found it was in the "interest of the community and in the interest of the child that Kevin be transferred to Circuit Court and tried under the ordinary laws governing crime."

Motions for separate trials were denied and the two were tried in August, 1982. The Commonwealth originally sought the death penalty against both defendants, but prior to trial it did not object to Buchanan's motion to exclude the application of the death penalty as to him. Buchanan received a life sentence and his conviction was upheld in his appeal to this Court.¹ Other facts will be recited as necessary for an understanding of the issues raised in this appeal.

Stanford has raised several issues in regard to the jury selection process. The procedure the trial court used was the optional method of interviewing prospective jurors individually in chambers concerning the two threshold issues of pretrial publicity and ability to consider the death penalty. The court ruled it would ask only one question concerning the death penalty issue and would not allow rehabilitation by counsel of those jurors who expressed an inability to impose the death penalty. The defendants' attorneys submitted a list of nearly 30 questions which the court declined to ask. Instead, each potential juror was asked the following question by the court: "Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstances *in this* or in any other case and regardless of what the evidence might be"?

The appellant alleges that the emphasized words violated the rule articulated in *Witherspoon v. Illinois*, 391

¹ See *Buchanan v. Com., Ky.*, 691 S.W.2d 210 (1985), cert. granted, ___ U.S. ___, 90 L. Ed. 2d 691 (1986) (85-5348).

U.S. 510, 88 S.Ct. 1770, 20 L. Ed. 2d 776 (1968), that prospective jurors not be asked "in advance of trial whether he would in fact vote for the extreme penalty in the case before him. . . ." *Id.*, 391 U.S. at 522, n. 21. In *Ice*, *supra*, p. 676, this court likewise held it to be error to question a juror whether he would consider imposing the death penalty in the "particular case before him."

We find no error in the form of the death-qualifying question posed to the jurors as the judge plainly asked each juror about his or her convictions "in this or in any other case," thus encompassing all such situations and not just the case to be tried. Further, the record shows that the judge was careful to explain to the veniremen that he was specifically not asking how they would decide the case at hand. While the death-qualifying question offered by the defendants, (number 24 in the list of 29)² may have been better phrased, there was nothing improper or prejudicial about the question asked by the trial court.

Stanford further complains he was denied his constitutional right to a fair trial on the basis that the jury was not selected from a representative cross section of the community. This argument is based on the following three factors: (1) that the court commenced jury selection on the last day of service for those serving in the jury

² 24. Are you so irrevocably opposed to the imposition of capital punishment in every possible case that you would be unwilling to consider all the penalties provided by law and would vote against the penalty of death regardless of facts and circumstances surrounding such individual cases?

pool, thereby, arguable, creating a jury of volunteers³; (2) that on the second day of jury selection the court's procedure of interviewing prospective jurors from the pool in alphabetical order resulted in adding only those people to the pool whose last names began with the letters A-H; and (3) that the jury was death-qualified.

We find this argument to be totally without merit. There is no indication that the statute regarding jury selection, KRS 29A.060, was other than strictly complied with. That several were excused for medical, employment or other hardship reasons was a matter within the discretion of the trial court. The court, however, did not excuse all those who expressed a desire to be excused. Those interviewed were not able to "opt in or out at will," a practice denounced in *United States v. Kennedy*, 548 F.2d 608, 612 (5th Cir. 1977), but had to demonstrate that prolonged service would create undue problems. The procedure utilized by the trial court in the *Kennedy* case was that of securing jurors from lists of those whose term of duty had already expired. The Commonwealth has referred us to *United States v. Anderson*, 500 F.2d 312 (D.C. Cir. 1974), the facts of which more closely correspond to those in the instant case, which holds as follows:

In separating those who could from those who could not afford to expand their service, the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality. We think a trial judge's

³ The trial court excused twenty-one (21) of the 59 veniremen questioned on the first day of trial for various personal or business reasons proffered by those jurors.

discretion in jury selection is broad enough to encompass consideration of adverse consequences which might be suffered by jurors suddenly called to a duty prolonged materially beyond their original expectations. *Id.* p. 322.

The second prong of this argument is truly spurious. The appellant cannot seriously contend that the trial court violated his right to a jury comprised of a fair cross section of the community by interviewing veniremen on the second day in alphabetical order. He has not identified any "distinctive" characteristic possessed by those whose surnames begin with the letters I-Z. See *Ford v. Com.*, Ky., 665 S.W.2d 304, 308 (1983), citing *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579 (1979). Moreover, had the appellant proven or articulated such characteristics, there was no error as more than half of the jurors who actually heard the case had surnames beginning with these letters. It is thus evident that the group was not excluded from the jury. Finally, as pointed out in *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968), "[t]he point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn. . . ." Thus, the court's use of a facially neutral procedure in questioning a panel of potential jurors does no harm to a defendant's due process rights.

Concerning the exclusion of those opposed to the imposition of the death penalty, such argument was rejected by this Court in Buchanan's appeal. (See footnote

1.) Further, the case of *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985) (en banc) relied upon by Stanford, was overruled by the Supreme Court in *Lockhart v. McCree*, ___ U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), which held as follows:

"Witherspoon - excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement. . . . It is for this reason that we conclude that "Witherspoon - excludables" do not constitute a "distinctive group" for cross-section purposes, and hold that "death qualification" does not violate the fair cross-section requirement."

Stanford further alleges the trial court denied him his right to a trial by an impartial jury by unduly restricting the voir dire examination. We have reviewed the record in light of this claim and find no support for this allegation. That the trial court refused to allow counsel to rehabilitate potential jurors struck for cause due to their stated inability to consider the death penalty, and further, that it refused to ask each juror during the limited in camera voir dire the exhausting list of questions posed by Stanford and his codefendant, did not in any manner, directly or by implication, hamper or impede the appellant's attorney in his questioning during the general voir dire or limit the scope of such examination at that time.

Simply put, the rulings and discussions of record concerning the list of questions proposed by the defendants never addressed the propriety of asking the questions during the general voir dire.⁴ We can find no rulings on the merits of the questions nor any hint of how the court would have ruled had appellant's counsel attempted to ask the questions of the jurors during the collective voir dire. As the trial court did not make any rulings adverse to the appellant during his counsel's questioning of the jury, we can find no error prejudicial to appellant. We do not disagree with appellant that he had a right to life-qualify the jury. In this regard we agree with the Court's holding in *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va.1981). Why, however, counsel chose not to explore "the veniremen's predilection for imposing the death penalty," *id.* at 215, is a question which cannot be attributed to any action or failing of the trial court.

Further, in this regard we find no error in the court's decision to strike for cause the seven jurors who indicated they would not under any circumstances impose the death penalty. These jurors were not excused merely because they "voiced general objections to the death penalty . . . , *Witherspoon*, *supra*, 391 U.S. at 522, or "would

⁴ It is easy to understand why the court declined to ask the questions during the individual voir dire. Not only was the list lengthy but several of the questions were so broad in nature that it could easily have taken several weeks to complete the individual voir dire. For example, question 5 asked, "How do you feel about the death penalty being a deterrent of crime"? Question 7(b) read, "What is your definition of reasonable doubt"? We note that these specific questions were not relevant to the issue at hand, that is, that of a juror's ability to be impartial, although others were more to the point.

rather not" impose the ultimate penalty. *People v. Szabo*, 94 Ill. 2d 327, 447 N.E.2d 193 (1983). Instead, the seven expressed in clear words that their attitudes were such that they could not impose the death penalty regardless of the circumstances presented. There was no equivocation as appellant would lead us to believe. The court's decision to strike the seven for cause was thus appropriate under the standard articulated in *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2326, 65 L. Ed. 2d 581, 589 (1980). In that case the Court concluded that only one whose views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" could be excluded from the jury. As explained in *Wainwright v. Witt*, ___ U.S. ___, 105 S.Ct. 844, ___ L. Ed. 2d ___ (1985), "[t]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of. . . ."

The appellant is correct that one may not be struck for cause merely because he would hesitate to vote for the death penalty, or has religious or philosophical qualms about imposing the penalty. Such "qualms" are to be expected. *People v. Szabo*, at 207. The appellant is not, however, aided by the cases cited for this proposition as, stated hereinbefore, the court did not strike any who were ambivalent. Further, the court correctly and properly inquired of those who initially expressed doubts whether or not it would be "impossible" for them to decide on the death penalty "regardless of the evidence." Only those who affirmatively stated it would be so impossible were excused for cause. The appellant criticizes the trial court for making such inquiry, arguing that in so doing the court gave the jurors "an opportunity to

escape making a difficult decision," and in effect told jurors "how to avoid serving on the case." We believe, however, that had the court failed to ascertain the extent of the jurors' views on the subject it would not have obtained the crucial information required by *Adams*, that is, whether their views were such as would impair their performance or duties as a juror.

That potential jurors may take probing questioning as an opportunity to sidestep their civic duty is a problem inherent in the jury selection process. That such actually occurred is a matter not likely to be evident from the record. Thus, it is incumbent upon us to trust in the impressions of the trial court.

As remarked in *Wainwright*:

Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id., pp. 852-853.

Concerning juror Harkess, whom the court refused to strike for cause, the court was satisfied, as are we, that she could decide the case solely on the evidence presented in court and not from media accounts. The judge found she could be "open minded" and we find nothing in her responses to the court to determine otherwise. Lastly in this category, any prejudice caused by the prosecutor's remarks concerning reasonable doubt during voir dire was cured by the court's admonition.

The most serious issue in the appeal, we believe, is the appellant's allegation that he was denied a fair trial because of the court's refusal to grant his motion for a separate trial and/or by the court's failure to exclude during the trial the confession of his nontestifying codefendant, Buchanan.⁵ This confession implicated Stanford as the triggerman in the murder and as a participant in the other crimes. The court ruled that it could "protect" Stanford by sanitizing the confession, that is, by not allowing Stanford's name to be mentioned by the witness, Detective Hall, to whom Buchanan confessed. Instead, he was consistently referred to as "some other person." As Hall related that Buchanan's expressed reason for confessing was to clear his uncle Calvin, and as Troy Johnson was referred to by name, the "other person," considering all the other evidence at trial, Stanford argues, could only have referred to him. Nevertheless, we believe the editing of his name from the confession was sufficient to protect his right to cross-examine inculcating witnesses, a right provided by the Confrontation Clause of the Sixth Amendment. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968).

⁵ Stanford additionally alleges he was entitled to a separate trial because the trial court's ruling which granted Buchanan's motion to exclude the death penalty as to him, a motion not objected to by the Commonwealth, amounted to a judicial usurpation of the jury's fact-finding role. That the Commonwealth decides to seek the death penalty against a defendant in a joint trial with a codefendant who is not death eligible does not "strip" the jury of its function in determining which defendant, if either, is ultimately responsible for the commission of the crime as charged. To accept Stanford's argument in this regard would preclude the state from ever trying defendants jointly when one is charged with a higher degree of culpability than the other.

Even if the admission of Buchanan's statement did constitute an error, it is subject to "harmless-error analysis," *Delaware v. Van Arsdall*, 475 U.S. ___, 106 S.Ct. ___, 89 L. Ed. 2d 674, 686 (1986), see also *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L. Ed. 2d 284 (1969), and *Lee v. Illinois*, 476 U.S. ___, 106 S.Ct. ___, 90 L. Ed. 2d 514 (1986), and our inquiry thus becomes whether the "error was harmless beyond a reasonable doubt." *Delaware*, p. 686; *Lowe v. Commonwealth, Ky.*, 487 S.W.2d 935 (1972).

Certainly Buchanan's confession was cumulative and, although not insignificant, it did not have the devastating quality as other direct evidence of Stanford's guilt, particularly that of his own extra-judicial admissions,⁶ the testimony of Troy Johnson and the physical evidence including his pubic hairs on various parts of the victim's body, and his fingerprints on the car. Considering all this other evidence before the jury, we believe the error in this case to be harmless. As the Supreme Court remarked in *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed.2d 340, 345 (1972), "Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly

⁶ Stanford told Richard Reetzhe that he would blow his brains out "just like the girl." He bragged to other juveniles while in the detention center that, "I made her suck my dick," and "we fucked her in the bootie." He explained to Michael Nally that, "I had to shoot her, the bitch lived next to me and she would recognize me."

rational explanation for the jury's verdict, completely consistent with the judge's instruction, stares us in the face."

The next group of alleged errors concerns various rulings of the trial court on evidentiary matters. First the appellant asserts that the admission of his remarks to Michael Nalley, a corrections officer at the detention center, constituted a violation of his Fifth and Sixth Amendment rights not to incriminate himself and to be represented by counsel. Nalley, who heard Stanford bragging to others in the center about his misdeeds,⁷ was asked by the appellant, in a conversation initiated by appellant, how much time he (Nalley) believed Stanford would have to serve for the crimes. After discussing how long and where he would serve, Nalley asked Stanford why he resorted to killing the victim of his sexual attacks. Nalley's testimony of Stanford's response is as follows:

[H]e said, I had to shoot her, the bitch lived next to me and she would recognize me. And then, in a laughing manner, Mr. Stanford went on and he continued, he said, I guess, we could have tied her up or something or beat the piss out of her . . . and tell her if she tells, we would kill her. . . . Then after he said that he started laughing and I just shook my head, and just continued to watch TV and didn't say anything else.

This conversation occurred several days after Stanford was placed in the detention center and advised of his rights. He insisted Nalley should have re-advised him of these rights, particularly his right not to be interrogated

⁷ See footnote 6, *supra*.

without counsel and that his failure to so warn required the suppression of Nalley's testimony. We do not agree.

In *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), relied upon by the trial court, the Supreme Court held that one who had asserted his right to be represented by counsel could not be interrogated further "unless the accused himself initiates further communication, exchanges or conversations with the police." There is no question, by asking the officer's opinion about the sentence he would receive, that Stanford "initiated" further conversation. See *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Considering the totality of the circumstances including the fact that he initiated the conversation, the question is whether the appellant validly waived his right to silence and to have counsel present. *Id.*, 462 U.S. at 1046. This question was answered adversely to the appellant by the trial court following the suppression hearing and the record supports its finding that the statement was voluntarily made. Stanford knew exactly who Nalley was. There was no evidence that he had any reason to believe his remarks to Nalley would be treated confidentially. Nalley certainly did nothing to keep Stanford from exercising his constitutional rights.

There is simply no merit to any of the other issues concerning the admission of evidence and we will not belabor this opinion by discussing each one individually. The findings of the trial court contained in its opinion and order in regard to the appellant's motion to suppress are supported by the record and its legal determinations are sound.

Stanford alleges that the trial court committed substantial error in violation of the Eighth and Fourteenth Amendments and Sections 11 and 17 of our Kentucky Constitution by excluding mitigating evidence offered by the defense during the penalty phase of the trial. This assignment of error warrants more than passing comments by us.

During the penalty phrase of the trial, Robert Jones, a former death row survivor, was called as a defense witness. Jones, at the time, was a supervisor for the (Louisville) Mayor's Summer Youth Program. He had experience with various programs dealing with youths on a counseling basis although he holds no academic or professional credentials. He was also vice-chairman of the Kentucky Coalition Against the Death Penalty. In that capacity he testified that he traveled about speaking to groups and conducting seminars against the death penalty. He claimed to be demonstrative evidence that one can be rehabilitated.

The trial court excluded his testimony before the jury. Jones' opinion, preserved by an avowal of why Kevin Stanford should not be executed is, partially, as follows:

Q And, sir, could you tell me your unique relationship with the death penalty?

A Well, at one time, I was on death row myself.

Jones related that in 1978 and 1979 he became familiar with Kevin Stanford while a youth counselor at a children's detention center. He talked with him again within a week before the trial began. Jones' avowal testimony continues:

A Yes, sir. I feel that Kevin need to be in an adult institution where the rehabilitation program and the proper training is a lots greater than it is in the juvenile facilities. I think that Kevin need discipline. I think that that Kevin's biggest problem is the lack of discipline in his life as a youth.

.....

A Sir, I truly feel that the death penalty is not appropriate for anyone I guess because my own personal experience that I've had. I am against capital punishment 1000% and I realize that even if Kevin was guilty of the crime, it's not going to bring the victim back. I feel that with his young age, that this man can be rehabilitated. And, if a 17 or 18 year old cannot be rehabilitated, then this is a failure in our correction department instead of the individual.

.....

I feel that this young man should be given this opportunity to place him in the Department of Corrections with the proper type of counseling. Now, I've heard that Kevin had a drug problem. There's no difference between a drug problem and an alcoholic problem.

.....

Q Do you think being in the penal population and being with the population in a penal system will affect Kevin?

A Mentally, yes, sir.

Q How will it affect him?

A I feel that Eddyville will make him or break him. And, I feel with the type of program that they have at Eddyville that he'd never been exposed to in a juvenile facility, that this is another thing, he would have an opportunity to get a GED; he'd have an opportunity to get him a college education; he'd have an

opportunity to get into so many type of vocational training and I think that this is what Kevin needs.

.....

Q Do you think a life sentence would wake him up to that fact?

A The life sentence is going to wake him up and the maximum security environment will wake him up.

Stanford argues that the exclusion of Jones' mitigating testimony was error of constitutional magnitude. We disagree and sustain the trial court ruling. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), sets the constitutional perimeters for dealing with the reception into evidence before a trier of fact of mitigating circumstances. The Supreme Court comments:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer [herein the jury], in all but the rarest kind of capital case [footnote omitted], not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Here referring to footnote 12: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"]. [Last three emphases ours.]

KRS 532.025, our death-qualifying statute, provides in part that after a conviction of a crime for which the death penalty may be imposed by jury, the trial shall resume and the prosecuting attorney shall open and the defendant shall conclude the evidence and arguments. The statute says that the judge or the jury shall consider "any mitigating circumstances or aggravating circumstances

otherwise authorized by law" and any of the eight statutory circumstances of mitigation.

The thrust of the claim of error was that the trial court erred in not allowing the jury to hear the testimony of Robert Jones because *Lockett, supra*, through the Eighth and Fourteenth Amendments, requires that the sentencing body consider any relevant evidence offered by the defense in mitigation of capital punishment. Further, KRS 532.025 authorizes the sentencing body to consider "any mitigating circumstances otherwise authorized by law."

Lockett expresses the minimum factors of what is admissible in complying with the Eighth and Fourteenth Amendments. The factors are the defendant's character, prior record and circumstances of the offense. KRS 532.025 is more expansive in that it spells out eight circumstances of mitigation that are relevant, and it contains a catch-all provision, "any mitigating circumstances otherwise authorized by law." This provision would permit the trial court to submit any redeeming evidence to the jury. However, we believe the evidence must contain facts or a qualified opinion bearing on the defendant's character, prior record or circumstances of the offense, or relative to one of the specified statutory mitigating circumstances.

Utilizing this standard, a review of Robert Jones' proffered testimony shows that it was clearly inadmissible. He had no testimony shows that it was clearly inadmissible. He had no academic or professional qualifications to all him to offer opinion evidence. His personal knowledge of Stanford was at best minimal and remote.

What very little of his testimony which might conceivably be admissible, such as the rehabilitative prospects of the defendant, was cumulative. The main theme of his testimony concerned his own philosophy about the value of the death sentence. We say clearly that was not admissible. The penalty phase of the trial is not an open forum for the expression of one's personal philosophical beliefs concerning the propriety of the death penalty. If permitted, the Commonwealth could offer rebuttal testimony about the moral righteousness of the death penalty, the result being that the jury would be bombarded with philosophical and moral opinions, none of which are relevant to the decision it must reach. See *Ice v. Com., Ky.*, 667 S.W.2d 671, 676 (1984). The trial court acted properly by excluding Robert Jones' testimony.

Stanford alleges that prejudicial error resulted when the prosecutor inquired during cross-examination of the appellant's stepfather whether he was aware that the victim was the mother of a small child. George Boller, appellant's stepfather, made a statement as a defense witness on cross-examination that the appellant was going to straighten his life out because he had a child. The prosecutor retaliated by asking Boller if he was aware that the victim had an eleven-month-old child. The matter was objected to and a motion for mistrial was lodged. The prosecutor claimed he was entitled to bring the matter out because Boller had opened the door by making a statement about the appellant's child. The trial court overruled the objection and motion for mistrial but gave the jury an admonition to disregard the nature of the information.

The statements have no relevancy or probative value and would, without question, have been suppressed if the trial court had been forewarned. Regardless, because the statements were injected before the jury, was the appellant denied a fair trial? We say no. The trial court kept the jury's mind in proper perspective with the admonition. It cured any inflammatory nature of the statement and we see no substance or reversible error pertaining to it. We simply comment that a trial of this magnitude will invariably be marred with occasional minor or surface knicks which, when cured by the trial court, cause no substantial error.

Stanford alleges the prosecutor's closing argument in the penalty phase deprived the appellant of his right to a fair trial consonant with due process of law, as guaranteed by the Kentucky and United States Constitutions, and introduced arbitrary considerations into the jury's decision-making process.

We can see where there was no objections by trial counsel on behalf of the appellant to the prosecutor's remarks because his remarks were so unclear as to be barely intelligible even under our close scrutiny. Such remarks, in our opinion, could hardly mislead anyone hearing them. Therefore, we are not persuaded by appellant's argument and do not read into the prosecutor's remarks that which the appellant reads into them. The prosecutor told the jury that appellant showed no remorse for his crime. The appellant argues that had he shown remorse by outburst before the jury, then the prosecutor would have contended that it was contrived. This assignment of error is so baseless it warrants no further discussion. As in *Marlowe v. Com.*, 709 S.W.2d

424, 431 (1986), we believe the jury would have returned the same sentence regardless of the comments complained of.

The appellant has devoted a substantial portion of his brief to his assertion that KRS 208.170 was applied in an unconstitutional manner in the process leading to the juvenile court's waiver of jurisdiction over him.⁸ He makes two arguments in support of this claim: (1) that the statute is applied in a racially discriminatory manner and (2) that he was found by the district court to be amenable to treatment.

Stanford has compiled a barrage of statistics in an attempt to persuade us that black youths were treated disproportionately under this statute in the juvenile division of the Jefferson District Court. The most disturbing statistic presented by Stanford is that of 56 grand jury referrals in the years 1975 through 1979, 68% were black juveniles, a group, according to the appellant's statistics, that comprised only 30% of the total number of referrals to juvenile court. He thus concludes that, although white juveniles committed twice as many offenses as blacks, they were referred to the grand jury at a rate of only half that of their black counterparts. We do not believe, however, that these statistics warrant the conclusion that race is in any way a factor in the waiver process.

It is quite possible that the percentages of grand jury referrals can be rationally explained by Stanford's figures which show black youths committed more than half of all the homicides and robberies and nearly half the assaults

⁸ Stanford concedes that the statute is facially valid.

and rapes. More to the point, though, we find these statistics to be inadequate in the drawing any conclusions bearing on this issue. For example, a factor not included in the appellant's analysis and one we believe crucial in order to find appellant to have set forth a *prima facie* case of racial discrimination in this context is the percentage, if any, of the 56 grand jury referrals that comprise repeat offenders, those, like Stanford, for whom the state's previous attempts to rehabilitate proved unsuccessful. We are not at all persuaded by Stanford's statistics and find no evidence whatsoever to convince us that Stanford or any other juvenile was directly or indirectly the victim of racial discrimination in waiver proceedings before the Jefferson District Court.

The second aspect of this allegation of error concerns the district court's finding of Stanford's amenability to treatment. Specifically the district court found that Stanford was "emotionally immature and *could be* amenable to treatment if properly done on a *long term basis* of psychotherapeutic intervention and reality based therapy for socialization and drug therapy in a residential facility." (Emphases added.) The court further found that such a facility did not exist in this state and concluded that it did not have authority to require the state to provide institutionalization outside the state or, importantly, the authority to keep Stanford institutionalized "for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation"

The thrust of Stanford's argument is that "the state has an obligation not to execute a juvenile who is deemed to be amenable to treatment but for whom the state offers no appropriate treatment program," and that imposing

the death penalty violates the state and federal constitutional prohibitions against cruel and unusual punishment.

We are not unmoved by Stanford's arguments in this regard. Nevertheless, it is apparent from the record that Stanford has been given the benefit of treatment available to youthful offenders in the Commonwealth on a repeated basis over a period of several years before his involvement in the crimes charged in the instant case. Since the age of ten, Stanford has revolved in and out of juvenile court having committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few. We do not know whether the county and state personnel who worked with Stanford in the various facilities in which he was placed are responsible for his failure to be rehabilitated or whether the fault lies within the appellant himself. What is clear, however, from the record and is contained in the district court's waiver order is that there was no program or treatment appropriate for the appellant in the juvenile justice system. Thus, even though he was exposed to the death penalty, the district court did not err in determining that it was in his best interest to be tried as an adult and thereby waiving jurisdiction over the appellant. *Sharp v. Commonwealth*, Ky., 559 S.W.2d 727 (1977). It was certainly not in his best interest, not to mention that of the community, to be committed to a treatment facility from which, after a brief period of time, he would again be free to murder or otherwise harm as he pleased.

Stanford demands that he has a constitutional right to treatment. We hold that he has already had all the treatment the Commonwealth can provide. No less than

three times in his brief he has reminded us of the previous observation of this Court, that "incorrigibility is inconsistent with youth." *Workman v. Com.*, Ky., 429 S.W.2d 374, 378 (1968). However, as we more recently recognized in *Ice v. Commonwealth*, *supra*, at p. 680, the reality, at times, is to the contrary.

In sum, the waiver statute was appropriately followed and not unconstitutionally applied to the appellant. His age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him. We do not believe the penalty to be inconsistent with any constitutional protections or requirements.

We have addressed the merits of all the issues we believe to be of any legal significance. Stanford has raised others which simply do not warrant detailed discussion. For example, he argues there was insufficient evidence to support his conviction for sodomy. Considering the position of the victim's body, that she was partially nude, that she incurred severe bruising to her anus and that the appellant's pubic hairs were found on her bare thigh as well as on other parts of her body or clothing, not mention his statement to others repeated elsewhere in this opinion that he required her to perform both oral and anal sodomy, there can be no serious contention that there was not sufficiency of evidence to submit this charge to the jury under the standard set forth in *Commonwealth v. Sawhill*, 660 S.W.2d 3 (1983). Likewise, appellant's claim that the police lacked probable cause to arrest him is frivolous. The police arrested Stanford after being informed by another juvenile who was caught selling stolen cigarettes that the cigarettes

had been obtained from Stanford who admitted stealing them from the Checker station.

The remaining assignments of error are unpersuasive, not because of their argument but because of their lack of legal substance. Because of that we will not comment upon them.

Finally, as in all capital cases, we have reviewed the sentence as required by KRS 532.075. As we stated in *Matthews v. Com.*, *supra* at p. 709, it is difficult to compare one murder case with another. However, we have no difficulty in stating that the sentence in the instant case is neither excessive nor disproportionate to the penalty imposed in similar cases.⁹

⁹ We have compiled data since 1970 in those cases where a death penalty has come before this Court for review, considering both aggravating and mitigating circumstances in those cases and comparing them with the present case. The cases we have considered are:

- 1) *Halvorsen & Willoughby v. Commonwealth*, ___ S.W.2d ___ (decided December 18, 1986).
- 2) *McClellan v. Commonwealth*, Ky., 715 S.W.2d 464 (1986).
- 3) *Bevins v. Commonwealth*, Ky., 712 S.W.2d 932 (1986).
- 4) *Marlowe v. Commonwealth*, Ky., 709 S.W.2d 424 (1986).
- 5) *Matthews v. Commonwealth*, Ky., 709 S.W.2d 421 (1986).
- 6) *Holland & James v. Commonwealth*, Ky., 703 S.W.2d 876 (1986).
- 7) *Kordenbrock v. Commonwealth*, Ky., 700 S.W.2d 384 (1985).
- 8) *Ward v. Commonwealth*, Ky., 695 S.W.2d 404 (1985).
- 9) *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672 (1985).
- 10) *Harper v. Commonwealth*, Ky., 694 S.W.2d 665 (1985).
- 11) *White v. Commonwealth*, Ky., 671 S.W.2d 241 (1984).

(Continued on following page)

The judgment of the Jefferson Circuit Court is affirmed.

Stephens, C.J., Gant, Lambert, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

(Continued from previous page)

- 12) *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984).
 - 13) *Ice v. Commonwealth*, Ky., 667 S.W.2d 671 (1984).
 - 14) *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980).
 - 15) *Smith v. Commonwealth*, Ky., 599 S.W.2d 900 (1980).
 - 16) *Hudson v. Commonwealth*, Ky., 597 S.W.2d 610 (1980).
 - 17) *Boyd v. Commonwealth*, Ky., 550 S.W.2d 507 (1977).
 - 18) *Meadows v. Commonwealth*, Ky., 550 S.W.2d 511 (1977).
 - 19) *Self v. Commonwealth*, Ky., 550 S.W.2d 509 (1977).
 - 20) *Lenston v. Commonwealth*, Ky., 497 S.W.2d 561 (1973).
 - 21) *Scott v. Commonwealth*, Ky., 495 S.W.2d 800 (1973).
 - 22) *Tinsley v. Commonwealth*, Ky., 495 S.W.2d 776 (1973).
 - 23) *Galbreath v. Commonwealth*, Ky., 492 S.W.2d 882 (1973).
 - 24) *Caine v. Commonwealth*, Ky., 491 S.W.2d 824 (1973).
 - 25) *Caldwell v. Commonwealth*, Ky., 503 S.W.2d 485 (1972).
 - 26) *Leigh v. Commonwealth*, Ky., 481 S.W.2d 75 (1972).
 - 27) *Call v. Commonwealth*, Ky., 482 S.W.2d 770 (1972).
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SUPREME COURT OF KENTUCKY

83-SC-65-MR

83-SC-66-MR

(title omitted in printing)

ORDER DENYING PETITION FOR
REHEARING ORDER GRANTING
PETITIONS FOR MODIFICATION

Appellant's petition for rehearing is denied.

The petitions of appellant and appellee for modification of the opinion are granted. The opinion is hereby modified by deleting pages 1, 2 and 8 of the original opinion and substituting new pages 1, 2 and 8 in lieu thereof.

All concur except Leibson, J., who did not sit.

ENTERED September 3, 1987.

/s/ Robert F. Stephens
Chief Justice

Juvenile Referrals by Planning Service Community,
Race and Year

P.D.C.	FIVE YEAR TOTAL					
	WHITE		BLACK		TOTAL	
	No.	%	No.	%	No.	%
(1)	322	16.5	1,625	83.5	1,947	100.0
2	1,904	66.5	958	33.5	2,862	100.0
(3)	85	9.5	811	90.5	896	100.0
(4)	1,019	45.9	1,200	54.1	2,219	100.0
(5)	137	6.1	2,127	93.9	2,264	100.0
(6)	300	15.7	2,041	84.3	2,421	100.0
(7)	230	27.3	612	72.7	842	100.0
8	1,004	83.1	204	16.9	1,208	100.0
9	2,154	89.7	247	10.3	2,401	100.0
10	3,032	91.1	296	8.9	3,328	100.0
11	3,927	96.9	126	3.1	4,053	100.0
12	3,300	94.1	206	5.9	3,506	100.0
13	4,078	79.6	1,042	20.4	5,120	100.0
14	2,000	94.6	115	5.4	2,123	100.0
15	1,514	93.8	100	6.2	1,614	100.0
Out of County	1,972	90.6	204	9.4	2,176	100.0
TOTAL	27,066	69.4	11,914	30.6	38,980	100.0

Institutionalization Referrals by
Planning Service Community, Race and Year

P.S.C.	FIVE YEAR TOTAL					
	WHITE		BLACK		TOTAL	
	No.	%	No.	%	No.	%
1	21	16.4	107	83.6	128	100.0
2	149	68.7	68	31.3	217	100.0
3	4	10.5	34	89.5	38	100.0
4	71	43.8	91	56.2	162	100.0
5	6	4.1	140	95.9	146	100.0
6	17	14.2	103	85.8	120	100.0
7	19	31.7	41	68.3	60	100.0
8	73	83.9	14	16.1	87	100.0
9	76	89.4	9	10.6	85	100.0
10	181	91.0	18	9.0	199	100.0
11	139	93.9	9	6.1	148	100.0
12	131	92.9	10	7.1	141	100.0
13	157	77.7	45	22.3	202	100.0
14	64	96.5	10	13.5	74	100.0
15	76	98.7	1	1.3	77	100.0
Out of County	41	83.7	8	16.3	49	100.0
TOTAL	1,225	63.4	708	36.6	1,933	100.0

Manner of Handling by Race and Year.

YEAR	WHITE						BLACK					
	FORMALS		INFORMALS		TOTAL		FORMALS		INFORMALS		TOTAL	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1979	3,254	59.5	2,219	40.5	5,473	100.0	1,667	73.5	602	26.5	2,269	100.0
1978	3,100	61.2	1,964	38.8	5,064	100.0	1,724	71.8	678	28.2	2,402	100.0
1977	3,186	62.2	1,935	37.8	5,121	100.0	1,726	74.0	605	26.0	2,331	100.0
1976	3,422	62.4	2,061	37.6	5,483	100.0	1,933	74.7	653	25.3	2,586	100.0
1975	3,508	59.2	2,417	40.8	5,925	100.0	1,636	70.3	690	29.7	2,326	100.0
TOTAL	16,470	60.9	10,596	39.1	27,066	100.0	8,686	72.9	3,228	27.1	11,914	100.0

YEAR	TOTAL					
	FORMALS		INFORMALS		TOTAL	
	No.	%	No.	%	No.	%
1979	4,921	63.6	2,821	36.4	7,742	100.0
1978	4,824	64.6	2,642	35.4	7,466	100.0
1977	4,912	65.9	2,540	34.1	7,452	100.0
1976	5,355	66.4	2,714	33.6	8,069	100.0
1975	5,144	62.3	3,107	37.7	8,251	100.0
TOTAL	25,156	64.5	13,824	35.5	38,980	100.0

YEAR	Major Property		Social Control		Persons (Phy. Harm)		Persons (No Harm)		TOTAL	
	No.	%	No.	%	No.	%	No.	%	No.	%
1979	0	-	0	-	6	100.0	0	-	6	100.0
1978	4	26.7	1	6.7	9	60.0	1	6.7	15	100.1
1977	2	22.2	0	-	6	66.7	1	11.1	9	100.0
1976	5	45.5	0	-	6	54.5	0	-	11	100.0
1975	10	66.7	1	6.7	3	20.0	1	6.7	15	100.1
TOTAL	21	37.5	2	3.6	30	53.6	3	5.4	56	100.1

First Offenders by Race and Year.

YEAR	WHITE				BLACK				TOTAL	
			Sub T				Sub T			
	MALE	FEMALE	No.	%	MALE	FEMALE	No.	%	No.	%
1979	1,920	952	2,872	76.3	547	343	890	23.7	3,762	100.0
1978	1,764	915	2,679	72.5	643	373	1,016	27.5	3,695	100.0
1977	1,809	879	2,688	73.9	593	350	951	26.1	3,639	100.0
1976	1,972	967	2,939	74.7	625	372	997	25.3	3,936	100.0
1975	1,988	921	2,909	77.0	536	292	828	22.2	3,737	100.0
TOTAL	9,453	4,634	14,087	75.1	2,944	1,738	4,682	24.9	18,769	100.0

Informal Adjustment Disposition by Race and Year.

YEAR	WHITE				BLACK				TOTAL	
			Sub T				Sub T			
	MALE	FEMALE	No.	%	MALE	FEMALE	No.	%	No.	%
1979	468	162	630	67.8	218	81	299	32.2	929	100.0
1978	467	189	656	62.4	301	95	396	37.6	1,052	100.0
1977	499	190	689	65.0	266	105	371	35.0	1,060	100.0
1976	481	140	621	67.0	234	72	306	33.0	927	100.0
1975	280	96	376	67.0	134	51	185	33.0	561	100.0
TOTAL	2,195	777	2,972	65.6	1,153	404	1,557	34.4	4,529	100.0

Grand Jury Referrals by Planning Service Community, Race and Year

P.S.C.	FIVE YEAR TOTAL					
	WHITE		BLACK		TOTAL	
	No.	%	No.	%	No.	%
1	0	-	8	100.0	8	100.0
2	2	40.0	3	60.0	5	100.0
3	0	-	3	100.0	3	100.0
4	1	16.7	5	83.3	6	100.0
5	0	-	4	100.0	4	100.0
6	2	22.2	7	77.8	9	100.0
7	0	-	2	100.0	2	100.0
8	1	100.0	0	-	1	100.0
9	3	100.0	0	-	3	100.0
10	3	75.0	1	25.0	4	100.0
11	2	100.0	0	-	2	100.0
12	2	66.7	1	33.3	3	100.0
13	0	-	3	100.0	3	100.0
14	0	-	0	-	0	-
15	1	100.0	0	-	1	100.0
Out of County	1	50.0	1	50.0	2	100.0
TOTAL	(18)	32.1	(38)	67.9	(56)	100.0

Homicide Referrals by Sex, Race and Year.

YEAR	WHITE			BLACK			TOTAL
	Male	Female	Sub T No. %	Male	Female	Sub T No. %	
1979	4	0	4 44.4	5	0	5 56.6	9 100.0
1978	5	0	5 50.0	3	2	5 50.0	10 100.0
1977	3	0	3 23.1	9	1	10 76.9	13 100.0
1976	7	2	9 56.3	7	0	7 43.8	16 100.0
1975	2	0	2 33.3	4	0	4 66.7	6 100.0
TOTAL	(21)	(2)	23 42.6	(28)	3	31 57.4	54 100.0

Homicide Referrals by Disposition and Year.

YEAR	F.A.W.L.		Grand Jury		Delinquent Institution		Probation		Community Resources		Other		TOTAL	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1979	4	44.4	2	22.2	2	22.2	1	11.1	0	-	0	-	9	99.9
1978	4	40.0	1	10.0	1	10.0	3	30.0	1	10.0	0	-	10	100.0
1977	5	38.5	2	15.4	3	23.1	2	15.4	1	7.7	0	-	13	100.1
1976	4	25.0	2	12.5	5	31.3	2	12.5	0	-	3	10.0	16	100.1
1975	1	16.7	1	16.7	3	50.0	0	-	1	16.7	0	-	6	100.1
TOTAL	10	33.3	8	14.0	14	25.9	6	14.8	3	5.6	3	5.6	54	100.0

1975

Table 2. Juvenile Referrals by Reason Referred, Sex and Race

REASON REFERRED	MALE						FEMALE						TOTAL	
	White		Black		Sub T.		White		Black		Sub T.		No.	%
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%		
Paternity	0	-	2	0.1	2	*	0	-	0	-	0	-	2	-
Marriage Request	5	0.1	0	-	5	0.1	12	0.8	0	-	12	0.8	17	0.2
Arson	47	1.1	9	0.5	56	0.9	0	-	3	0.5	3	0.3	59	0.7
Assault Aggravated	54	1.2	44	2.5	98	1.6	11	0.7	17	3.0	28	1.4	126	1.5
Assault	128	2.9	86	4.9	214	3.5	13	0.9	28	4.9	41	2.0	255	3.1
Attempted Suicide	4	0.1	0	-	4	0.1	1	0.1	0	-	1	0.1	5	0.1
Auto Tampering	20	0.5	6	0.3	26	0.4	1	0.1	0	-	1	0.1	27	0.3
Auto Theft	15	0.3	3	0.2	18	0.3	0	-	0	-	0	-	18	0.2
Unauthorized Use of Auto	77	1.7	7	0.4	84	1.4	2	0.1	1	0.2	3	0.1	87	1.1
Banding to Commit Felony	3	0.1	1	0.1	4	0.1	5	0.3	0	-	5	0.2	9	0.1
Disorderly Conduct	392	8.8	104	5.9	496	8.0	100	6.7	32	5.6	132	6.4	628	7.6
Destruction of Property	114	2.6	43	2.5	157	2.5	1	0.1	10	1.7	11	0.5	168	2.0
Dependency	282	6.4	116	6.6	398	6.4	298	19.9	108	18.8	406	19.6	804	9.7
Drunkenness	180	4.1	5	0.3	185	3.0	17	1.1	0	-	17	0.8	202	2.4
Dwellinghouse Breaking	45	1.0	44	2.5	89	1.4	0	-	0	-	0	-	89	1.1
Forcible Rape	16	0.4	5	0.3	21	0.3	0	-	0	-	0	-	21	0.3
Grand Larceny	182	4.1	77	4.4	259	4.2	3	0.2	3	0.5	6	0.3	265	3.2
Loitering	14	0.3	28	1.6	42	0.7	4	0.3	8	1.4	12	0.6	54	0.7
Murder & Manslaughter	2	*	4	0.2	6	0.1	0	-	0	-	0	-	6	0.1
Outhouse Breaking	0	-	0	-	0	-	0	-	0	-	0	-	0	-
Petit Larceny	112	2.5	56	3.2	168	2.7	42	2.8	14	2.4	56	2.7	224	2.7
Poss./Drinking Liquor	277	6.3	8	0.5	285	4.6	53	3.5	3	0.5	56	2.7	341	4.1
Robbery: Purse Snatching	9	0.2	35	2.0	44	0.7	1	0.1	4	0.7	5	0.2	49	0.6
Robbery	67	1.5	72	4.1	139	2.3	1	0.1	10	1.7	11	0.5	150	1.8
Runaway: In County	59	1.3	22	1.3	81	1.3	154	10.3	30	5.2	184	8.9	265	3.2
Runaway: Out of County	13	0.3	0	-	13	0.2	21	1.4	4	0.7	25	1.2	38	0.5
Runaway: Out of State	64	1.4	3	0.2	67	1.1	66	4.4	4	0.7	70	3.4	137	1.7
Runaway: AWOL	76	1.7	35	2.0	111	1.8	58	3.9	24	4.2	82	4.0	193	2.3

1975

Table 2. Juvenile Referrals by Reason Referred, Sex and Race (Con't.)

REASON REFERRED	MALE						FEMALE						TOTAL	
	White		Black		Sub Y.		White		Black		Sub Y.		TOTAL	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
School House Breaking	3	0.1	3	0.2	6	0.1	0	-	0	-	0	-	6	0.1
Sex Offenses	27	0.6	12	0.7	39	0.6	12	0.8	15	2.6	27	1.3	66	0.8
Shoplifting	254	5.7	218	12.4	472	7.6	243	16.3	141	24.6	384	18.6	856	10.4
Storehouse Breaking	17	0.4	10	0.6	27	0.4	0	-	0	-	0	-	27	0.3
Traffic Offenses	133	3.0	18	1.0	151	2.4	8	0.5	1	0.2	9	0.4	160	1.9
Truancy	134	3.0	21	1.2	155	2.5	98	6.6	18	3.1	116	5.6	271	3.3
Un governable Behavior	129	2.9	66	3.8	195	3.2	107	7.2	60	10.5	167	8.1	362	4.4
Uttering a Forged Inst.	20	0.5	12	0.7	32	0.5	6	0.4	6	1.0	12	0.6	44	0.5
Vio. Drug Laws: Narcotic	144	3.2	25	1.4	169	2.7	27	1.8	4	0.7	31	1.5	200	2.4
Vio. Drug Laws	206	4.6	45	2.6	251	4.1	23	1.5	7	1.2	30	1.5	281	3.4
Weapons: Carrying/Possess	32	0.7	20	1.1	52	0.8	4	0.3	3	0.5	7	0.3	59	0.7
Neighborhood Complaint	3	0.1	0	-	3	0.1	2	0.1	2	0.3	4	0.2	7	0.1
Other	194	4.4	96	5.5	290	4.7	34	2.3	8	1.4	42	2.0	332	4.0
Burglary	650	14.7	363	20.7	1,013	16.4	29	1.9	4	0.7	33	1.6	1,046	12.7
Possess. Burglary Tools	17	0.4	14	0.8	31	0.5	0	-	1	0.2	1	0.1	32	0.4
False Alarms	25	0.6	8	0.5	33	0.5	1	0.1	1	0.2	2	0.1	35	0.4
Glue/Paint Sniffing	186	4.2	6	0.3	192	3.1	36	2.4	0	-	36	1.7	228	2.8
TOTAL	4,431	100.0	1,752	100.1	6,183	99.9	1,494	100.0	574	99.9	2,068	100.0	8,251	99.9

*Less than 0.1 percent.

1976

Table 2. Juvenile Referrals by Reason Referred, Sex and Race

REASON REFERRED	MALE						FEMALE						TOTAL	
	White		Black		Sub Y		White		Black		Sub Y			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Non Support	1	*	0	-	1	*	0	-	0	-	0	-	1	*
Paternity	3	.1	8	.4	11	.2	0	-	0	-	0	-	11	.1
Marriage Request	1	*	0	-	1	*	6	.4	0	-	6	.3	7	.1
Arson	44	1.1	18	.9	62	1.1	2	.1	0	-	2	.1	64	.8
Assault: Aggravated	69	1.7	67	3.5	136	2.3	15	1.0	23	3.5	38	1.8	174	2.2
Assault	150	3.7	121	6.3	271	4.6	25	1.7	49	7.4	74	3.5	345	4.3
Attempted Suicide	2	.1	0	-	2	*	1	.1	1	.2	2	.1	4	.1
Auto Tampering	5	.1	14	.7	19	.3	0	-	0	-	0	-	19	.2
Auto Theft	9	.2	3	.2	12	.2	1	.1	0	-	1	*	13	.2
Unauthorized Use of Auto	49	1.2	18	.9	67	1.1	3	.2	0	-	3	.1	70	.9
Banding To Commit Felony	8	.2	4	.2	12	.2	2	.1	1	.2	3	.1	15	.2
Disorderly Conduct	262	6.5	91	4.7	353	5.9	60	4.1	23	3.5	83	3.9	436	5.4
Destruction of Property	105	2.6	50	2.6	155	2.6	9	.6	1	.2	10	.5	165	2.0
Dependency	236	5.9	132	6.8	368	6.2	255	17.6	112	17.0	367	17.4	735	9.1
Drunkenness	192	4.8	1	.1	193	3.3	25	1.7	1	.2	26	1.2	219	2.7
Dwellinghouse Breaking	16	.4	10	.5	26	.4	0	-	0	-	0	-	26	.3
Forcible Rape	14	.3	18	.9	32	.5	0	-	0	-	0	-	(32)	.4
Grand Larceny	277	6.9	155	8.0	432	7.3	15	1.0	24	3.7	39	1.9	471	5.8
Loitering	10	.2	18	.9	28	.5	5	.4	2	.3	7	.3	35	.4
Murder and Manslaughter	7	.2	7	.4	14	.2	2	.1	0	-	2	.1	16	.2
Outhouse Breaking	1	*	0	-	1	*	0	-	0	-	0	-	1	*
Petit Larceny	258	6.4	140	7.3	398	6.7	172	11.8	64	9.7	236	11.2	634	7.9
Possessing/Drinking Liquor	254	6.3	10	.5	264	4.4	45	3.1	0	-	45	2.1	309	3.8
Robbery: Purse Snatching	12	.3	14	.7	26	.4	3	.2	3	.4	6	.3	32	.4
Robbery	44	1.1	81	4.2	125	2.1	3	.2	5	.8	8	.4	133	1.6
Runaway: In County	79	2.0	23	1.2	102	1.7	167	11.5	33	5.0	200	9.5	302	3.7
Runaway: Out of County	12	.3	2	.1	14	.2	24	1.7	0	-	24	1.1	38	.5
Runaway: Out of State	34	.8	2	.1	36	.6	64	4.4	6	.9	70	3.3	106	1.3
Runaway: AWOL	53	1.3	15	.8	68	1.2	26	1.8	10	1.5	36	1.7	104	1.3

*Less than .1 per cent.

1976

Table 2. Continued

REASON REFERRED	MALE						FEMALE						TOTAL	
	White		Black		Sub T		White		Black		Sub T			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
School House Breaking	2	.1	6	.3	8	.1	0	-	0	-	0	-	8	.1
Sex Offenses	16	.4	22	1.1	38	.6	7	.5	8	1.2	15	.7	53	.7
Shoplifting	89	2.2	149	7.7	238	4.0	83	5.7	128	19.5	211	10.0	449	5.6
Storehouse Breaking	3	.1	2	.1	5	.1	0	-	0	-	0	-	5	.1
Traffic Offenses	147	3.6	12	.6	159	2.7	13	.9	5	.8	18	.9	177	2.2
Truancy	253	6.3	76	3.9	329	5.5	209	14.4	54	8.2	263	12.5	592	7.3
Ungovernable Behavior	126	3.1	65	3.4	191	3.2	95	6.5	62	9.4	157	7.4	348	4.3
Uttering a Forged Inst.	11	.3	5	.3	16	.3	6	.4	10	1.5	16	.8	32	.4
Vio. Drug Laws: Narcotic	55	1.4	21	1.1	76	1.3	11	.8	1	.2	12	.6	88	1.1
Vio. Drug Laws	194	4.8	45	2.3	239	4.0	23	1.6	7	1.1	30	1.4	269	3.3
Weapons: Carrying/Poss.	18	.4	19	1.0	37	.6	3	.2	6	.9	9	.4	46	.6
Neighborhood Complaint	2	.1	0	-	2	*	0	-	0	-	0	-	2	*
Other	197	4.9	105	5.4	302	5.1	35	2.4	13	2.0	48	2.3	350	4.3
Burglary	587	14.6	350	18.2	937	15.7	27	1.9	5	.8	32	1.5	969	12.0
Possessing Burglary Tools	5	.1	21	1.1	26	.4	0	-	0	-	0	-	26	.3
False Alarms	13	.3	5	.3	18	.3	0	-	0	-	0	-	18	.2
Glue/Paint Sniffing	105	2.6	4	.2	109	1.8	11	.8	0	-	11	.5	120	1.5
TOTAL	4,030	100.0	1,929	99.9	5,959	99.9	1,453	100.0	657	100.1	2,110	99.9	8,069	99.9

*Less than .1 per cent.

Table 2. Juvenile Referrals by Reason Referred, Sex and Race

REASON REFERRED	MALE						FEMALE						TOTAL	
	White		Black		Sub. Y.		White		Black		Sub. Y.			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Murder/Manslaughter	3	.1	9	.5	12	.2	0	-	1	.2	1	.1	13	.2
Assault (1-3 Degree	59	1.6	57	3.4	116	2.1	10	.8	13	2.0	23	1.1	139	1.9
Wanton Endangerment (1)	69	1.8	37	2.2	106	1.9	4	.3	8	.4	7	.3	113	1.5
Unlawful Imprisonment (1)	1	-*	1	.1	2	-*	0	-	1	.2	1	.1	3	-
Robbery	66	1.7	85	5.1	151	2.8	3	.2	6	.9	9	.4	160	2.1
Rapes	11	.3	4	.2	15	.3	0	-	0	-	0	-	15	.2
Delinquent Sex Offense	14	.4	6	.4	20	.4	0	-	0	-	0	-	20	.3
Burglary	592	15.7	337	20.1	929	17.0	29	2.2	9	1.4	38	1.9	967	13.0
Criminal Mischief	16	.4	6	.4	22	.4	1	.1	0	-	1	.1	23	.3
Arson	15	.4	9	.5	24	.4	3	.2	0	-	3	.2	27	.4
Theft (Over \$100)	369	9.8	154	9.2	523	9.6	37	2.7	38	5.8	75	3.8	598	8.0
Receiving Stolen Property (Over \$100)	67	1.8	28	1.7	95	1.7	4	.3	2	.3	6	.3	101	1.4
Forgery	8	.2	8	.5	16	.3	3	.2	2	.3	5	.3	21	.3
Narcotics (Schedule I)	6	.2	1	.1	7	.1	5	.4	1	.2	6	.3	13	.2
Trafficking (I,II,III)	23	.6	3	.2	26	.5	3	.2	1	.2	4	.2	30	.4
Assault (3)	76	2.0	61	3.6	137	2.5	17	1.3	37	5.6	54	2.7	191	2.6
Menacing	16	.4	12	.7	28	.5	4	.3	2	.3	6	.3	34	.5
Wanton Endangerment (2)	13	.3	5	.3	18	.3	1	.1	1	.2	2	.1	20	.3
Terroristic Threat	21	.6	20	1.2	41	.8	2	.1	4	.6	6	.3	47	.6
Unlawful Imprisonment	0	-	0	-	0	-	0	-	0	-	0	-	0	-
Sex Offenses	21	.6	12	.7	33	.6	9	.7	20	3.0	29	1.4	62	.8
Possessing Burglary Tools	17	.5	7	.4	24	.4	0	-	0	-	0	-	24	.3
Criminal Trespassing (1-2)	52	1.4	33	2.0	85	1.6	5	.4	1	.2	6	.3	91	1.2
Criminal Mischief (2-3)	81	2.1	31	1.8	112	2.1	13	1.0	4	.6	17	.8	129	1.7
Theft (Under \$100)	237	6.3	269	16.0	506	9.3	201	14.9	193	29.5	394	17.7	900	12.1
Receiving Stolen Property (Under \$100)	12	.3	11	.7	23	.4	2	.1	2	.3	4	.2	27	.4
Unauthorized Use of Auto	9	.2	5	.3	14	.3	3	.2	1	.2	4	.2	18	.2
Forgery (3)	12	.3	2	.1	14	.3	3	.2	2	.3	5	.3	19	.3

*Less than .1 percent.

1977

Table 2. Continued.

REASON REFERRED	MALE						FEMALE						TOTAL	
	White		Black		Sub T.		White		Black		Sub T.			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Disorderly Conduct	333	8.8	95	5.7	428	7.9	81	6.0	37	5.6	118	5.9	546	7.3
Controlled Substance Vio.	16	.4	3	.2	19	.3	2	.1	0	-	2	.1	21	.3
Marijuana Violation	203	5.4	44	2.6	247	4.5	37	2.7	8	1.2	45	2.3	292	3.9
Concealed Deadly Weapon	14	.4	14	.8	28	.5	1	.1	1	.2	2	.1	30	.4
Criminal Trespass (3)	33	.9	15	.9	48	.9	5	.4	0	-	5	.3	53	.7
Loitering	10	.3	23	1.4	33	.6	1	.1	5	.7	6	.3	39	.5
Improper Use of Solvent	106	2.8	2	.1	108	2.0	10	.8	0	-	10	.5	118	1.6
AWOL from Facility	39	1.0	8	.5	47	.9	28	2.1	8	1.2	36	1.8	83	1.1
Alcohol/Drunk Violation	409	10.8	26	1.5	435	8.0	81	6.0	2	.3	83	4.1	518	7.0
Traffic Offense	147	3.9	12	.7	159	2.9	12	.9	1	.2	13	.6	172	2.3
False Alarms	5	.1	0	-	5	.1	1	.1	0	-	1	.1	6	.1
Neighborhood Complaint	4	.1	2	.1	6	.1	0	-	0	-	0	-	6	.1
Runaway	106	2.8	17	1.0	123	2.3	294	21.8	49	7.5	343	17.1	466	6.3
Truancy	81	2.1	21	1.3	102	1.9	67	5.0	11	1.7	78	3.9	180	2.4
Ungovernable Behavior	102	2.7	47	2.8	149	2.7	85	6.3	40	6.1	125	6.1	274	3.7
Marriage Request	0	-	0	-	0	-	3	.2	0	-	3	.1	3	-.*
Abused Child	59	1.6	20	1.2	79	1.4	71	5.3	26	4.0	97	4.8	176	2.4
Neglected Child	184	4.9	102	6.1	286	5.2	157	11.7	102	15.6	259	12.9	545	7.3
Sexual Abuse	2	.1	3	.2	5	.1	14	1.0	5	.7	19	.9	24	.3
Temporary Custody	33	.9	10	.6	43	.8	34	2.5	15	2.3	49	2.4	92	1.2
Other	3	.1	0	-	3	.1	0	-	0	-	0	-	3	-.*
TOTAL	3,775	100.1	1,677	100.1	5,452	100.0	1,346	100.0	654	100.0	2,000	100.0	7,452	100.1

*Less than .1 percent.

Table 2. JUVENILE REFERRALS BY REASON REFERRED, SEX AND RACE

REASON REFERRED	WHITE						BLACK						TOTAL	
	MALE		FEMALE		Sub T.		MALE		FEMALE		Sub T.			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FELONIES														
Murder/Manslaughter	5	.1	0	-	5	.1	3	.2	2	.3	5	.2	10	.1
Assault (1-2 Degree)	74	2.0	5	.4	79	1.6	58	3.2	11	1.8	69	2.9	148	2.0
Wanton Endangerment (1)	48	1.3	2	.1	50	1.0	44	2.4	5	.8	49	2.0	99	1.3
Unlawful Imprisonment (1)	0	-	2	.1	2	.*	2	.1	0	-	2	.1	4	.1
Robbery	71	1.9	2	.1	73	1.4	83	4.6	5	.8	88	3.7	161	2.2
Rape	9	.3	0	-	9	.2	12	.7	1	.2	13	.5	22	.3
Felonious Sex Offense	15	.4	0	-	15	.3	6	.3	0	-	6	.3	21	.3
Burglary	525	14.3	37	2.7	562	11.1	315	17.5	10	1.7	325	13.5	887	11.9
Criminal Mischief (1)	14	.4	1	.1	15	.3	10	.6	1	.2	11	.5	26	.3
Arson	17	.5	6	.4	23	.4	4	.2	1	.2	5	.2	28	.4
Theft (Over \$100)	283	7.7	39	2.8	322	6.4	190	10.5	28	4.7	218	9.1	540	7.2
Receiving Stolen Property (Over \$100)	60	1.6	5	.4	65	1.3	26	1.4	1	.2	27	1.1	92	1.2
Forgery (1-2)	10	.3	6	.4	16	.3	4	.2	4	.7	8	.3	24	.3
Narcotics (Schedule I)	5	.1	6	.4	11	.2	0	-	0	-	0	-	11	.1
Trafficking (I, II, III)	29	.8	4	.3	33	.6	6	.3	1	.2	7	.3	40	.5
MISDEMEANORS														
Assault (3)	76	2.1	13	.9	89	1.8	59	3.3	20	3.3	79	3.3	168	2.3
Menacing	21	.6	10	.7	31	.6	6	.3	4	.7	10	.4	41	.5
Wanton Endangerment (2)	9	.3	1	.1	10	.2	14	.8	1	.2	15	.6	25	.3
Terroristic Threat	24	.7	9	.6	33	.6	12	.7	1	.2	13	.5	46	.6
Unlawful Imprisonment	1	.*	0	-	1	.*	0	-	0	-	0	-	1	.*
Sex Offenses	15	.4	10	.7	25	.5	7	.4	13	2.2	20	.8	45	.6
Possessing Burglary Tools	10	.3	0	-	10	.2	15	.8	0	-	15	.6	25	.3
Criminal Trespassing (1-2)	55	1.5	9	.6	64	1.3	48	2.7	0	-	48	2.0	112	1.5
Criminal Mischief (2-3)	101	2.8	11	.8	112	2.2	53	2.9	1	.2	54	2.3	166	2.2
Theft (Under \$100)	343	9.4	273	19.5	616	12.2	297	16.5	180	29.9	477	19.9	1,093	14.6
Receiving Stolen Property (Under \$100)	18	.5	7	.5	25	.5	8	.4	3	.5	11	.5	36	.5
Unauthorized Use of Auto	13	.4	0	-	13	.3	5	.3	1	.2	6	.3	19	.3
Forgery (3)	3	.1	1	.1	4	.1	4	.2	2	.3	6	.3	10	.1

*Denotes less than .1 percent.

1978

Table 2. JUVENILE REFERRALS BY REASON REFERRED, SEX AND RACE (Continued)

REASON REFERRED	WHITE						BLACK						TOTAL	
	MALE		FEMALE		Sub T.		MALE		FEMALE		Sub T.			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
MISDEMEANORS CONTINUED														
Disorderly Conduct	315	8.6	90	6.4	405	8.0	106	5.9	26	4.3	132	5.5	537	7.2
Controlled Substance Vio.	16	.4	10	.7	26	.5	3	.2	1	.2	4	.2	30	.4
Marijuana Violation	206	5.6	37	2.7	243	4.8	40	2.7	11	1.8	59	2.5	302	4.0
Concealed Deadly Weapon	23	.6	3	.2	26	.5	14	.8	1	.2	15	.6	41	.5
MISC. VIOLATIONS														
Criminal Trespass (3)	59	1.6	8	.6	67	1.3	44	2.4	0	-	44	1.8	111	1.5
Loitering	9	.3	8	.6	17	.3	10	.6	3	.5	13	.5	30	.4
Improper Use of Solvent	92	2.5	16	1.1	108	2.1	0	-	0	-	0	-	108	1.4
AWOL from Facility	27	.7	28	2.0	55	1.1	4	.2	8	1.3	12	.5	67	.9
Alcohol/Drunk Violation	396	10.8	59	4.2	455	9.0	26	1.4	8	1.3	34	1.4	489	6.6
Traffic Offense	102	2.8	16	1.1	118	2.3	12	.7	2	.3	14	.6	132	1.8
False Alarms	1	-.*	1	.1	2	-.*	1	.1	1	.2	2	.1	4	.1
Neighborhood Complaint	2	.1	0	-	2	-.*	0	-	3	.5	3	.1	5	.1
STATUS OFFENSES														
Runaway	100	2.7	224	16.0	324	6.4	21	1.2	32	5.3	53	2.2	377	5.1
Truancy	95	2.6	80	5.7	175	3.5	29	1.6	33	5.5	62	2.6	237	3.2
Ungovernable Behavior	96	2.6	55	3.9	151	3.0	61	3.4	41	6.8	102	4.2	253	3.4
PROTECTIVE SERVICES														
Marriage Request	1	-.*	4	.3	5	.1	0	-	0	-	0	-	5	.1
Abused Child	52	1.4	67	4.8	119	2.4	25	1.4	21	3.5	46	1.9	165	2.2
Neglected Child	140	3.8	136	9.7	276	5.5	80	4.4	70	11.5	150	6.2	426	5.7
Sexual Abuse	1	-.*	13	.9	14	.3	0	-	1	.2	1	-.*	15	.2
Temporary Custody	74	2.0	85	6.1	159	3.1	24	1.3	39	6.5	63	2.6	222	3.0
Other	3	.1	1	.1	4	.1	2	.1	4	.7	6	.3	10	.1
TOTAL	3,664	100.0	1,400	99.9	5,064	100.0	1,001	99.9	601	100.1	2,402	100.0	,466	99.9

*Denotes less than .1 percent.

Table 3. JUVENILE REFERRALS BY REASON REFERRED, SEX AND RACE

REASON REFERRED	WHITE						BLACK						TOTAL	
	Male		Female		Sub T		Male		Female		Sub T			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
FELONIES														
Murder/Manslaughter	4	.1	0	-	4	.1	5	.3	0	-	5	.2	9	.1
Assault (1-2 Degree)	59	1.5	15	1.0	74	1.4	58	3.5	7	1.2	65	2.9	139	1.8
Wanton Endangerment (1)	70	1.8	7	.5	77	1.4	30	1.8	5	.8	35	1.5	112	1.4
Unlawful Imprisonment (1)	2	.1	1	.1	3	.1	0	-	0	-	0	-	3	.*
Robbery	61	1.5	6	.4	67	1.2	94	5.7	9	1.5	103	4.5	170	2.2
Rape	3	.1	0	-	3	.1	7	.4	0	-	7	.3	10	.1
Felonious Sex Offense	11	.3	1	.1	12	.2	14	.8	0	-	14	.6	26	.3
Burglary	653	16.4	45	3.0	698	12.8	331	19.9	16	2.6	347	15.3	1,045	13.5
Criminal Mischief (1)	22	.5	0	-	22	.4	8	.5	1	.2	9	.4	31	.4
Arson	38	1.0	4	.2	42	.8	12	.7	1	.2	13	.6	55	.7
Theft (Over \$100)	280	7.0	35	2.3	315	5.8	163	9.8	23	3.8	186	8.2	501	6.5
Receiving Stolen Property (Over \$100)	61	1.5	5	.3	66	1.2	39	2.3	3	.5	42	1.8	108	1.4
Forgery (1-2)	11	.3	6	.4	17	.3	6	.4	1	.2	7	.3	24	.3
Narcotics (Schedule I)	7	.2	1	.1	8	.1	0	-	0	-	0	-	8	.1
Trafficking (I, II, III)	29	.7	1	.1	30	.5	3	.2	0	-	3	.1	33	.4
MISDEMEANORS														
Assault (3)	69	1.7	24	1.6	93	1.7	57	3.4	24	4.0	81	3.6	174	2.2
Menacing	22	.5	6	.4	28	.5	7	.4	4	.6	11	.5	39	.5
Wanton Endangerment (2)	13	.3	1	.1	14	.3	11	.7	4	.6	15	.7	29	.4
Terroristic Threat	35	.9	4	.2	39	.7	10	.6	4	.6	14	.6	53	.7
Unlawful Imprisonment	0	-	0	-	0	-	0	-	0	-	0	-	0	-
Sex Offenses	15	.4	9	.6	24	.4	6	.4	6	1.0	12	.5	36	.5
Possessing Burglary Tools	16	.4	1	.1	17	.3	15	.9	0	-	15	.7	32	.4
Criminal Trespassing (1-2)	68	1.7	11	.7	79	1.4	22	1.3	2	.3	24	1.1	103	1.3
Criminal Mischief (2-3)	100	2.5	4	.2	104	1.9	42	2.5	2	.3	44	1.9	148	1.9
Theft (Under \$100)	334	8.4	257	17.2	591	10.8	293	17.6	160	26.4	453	20.0	1,044	13.5
Receiving Stolen Property (Under \$100)	13	.3	1	.1	14	.3	6	.4	0	-	6	.3	20	.3
Unauthorized Use of Auto	7	.2	2	.1	9	.2	0	-	0	-	0	-	9	.1
Forgery (3)	2	.1	0	-	2	.*	1	.1	1	.2	2	.1	4	.1

*Denotes less than percent.

1979

Table 3. JUVENILE REFERRALS BY REASON REFERRED, SEX AND RACE (Continued)

REASON REFERRED	WHITE						BLACK						TOTAL	
	Male		Female		Sub T		Male		Female		Sub T			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%		
MISDEMEANORS CONTINUED														
Disorderly Conduct	297	7.5	116	7.8	413	7.5	82	4.9	38	6.3	120	5.3	533	6.9
Controlled Substance Vio	12	.3	7	.5	19	.3	6	.4	0	-	6	.3	25	.3
Marijuana Violation	226	5.7	43	2.9	269	4.9	33	2.0	5	.8	38	1.7	307	4.0
Concealed Deadly Weapon	24	.6	0	-	24	.4	13	.8	2	.3	15	.7	39	.5
MISC./VIOLATIONS														
Criminal Trespass (3)	48	1.2	5	.3	53	1.0	24	1.4	8	1.3	32	1.4	85	1.1
Loitering	11	.3	3	.2	14	.3	5	.3	3	.5	8	.4	22	.3
Improper Use of Solvent	50	1.3	6	.4	56	1.0	3	.2	0	-	3	.1	59	.8
ANOL from Facility	47	1.2	42	2.8	89	1.6	6	.4	8	1.3	14	.6	103	1.3
Alcohol/Drunk Violation	542	13.6	115	7.7	657	12.0	23	1.4	6	1.0	29	1.3	686	8.9
Traffic Offense	110	2.8	13	.9	123	2.2	11	.7	3	.5	14	.6	137	1.8
Pulse Alarms	1	.*	3	.2	4	.1	2	.1	0	-	2	.1	6	.1
Neighborhood Complaint	0	-	0	-	0	-	0	-	0	-	0	-	0	-
STATUS OFFENSES														
Runaway	124	3.1	241	16.1	365	6.7	16	1.0	45	7.4	61	2.7	426	5.5
Truancy	111	2.8	83	5.6	194	3.5	31	1.9	29	4.8	60	2.6	254	3.3
Un governable Behavior	84	2.1	46	3.1	130	2.4	34	2.0	37	6.1	71	3.1	201	2.6
PROTECTIVE SERVICES														
Marriage Request	2	.1	3	.2	5	.1	0	-	0	-	0	-	5	.1
Abused Child	57	1.4	86	5.8	143	2.6	21	1.3	28	4.6	49	2.2	192	2.5
Neglected Child	137	3.4	115	7.7	252	4.6	72	4.3	67	11.0	139	6.1	391	5.0
Sexual Abuse	1	.*	20	1.3	21	.4	4	.2	4	.7	8	.4	29	.4
Temporary Custody	82	2.1	98	6.6	180	3.3	33	2.0	51	8.4	84	3.7	264	3.4
Other	9	.2	1	.1	10	.2	3	.2	0	-	3	.1	13	.2
TOTAL	3,980	100.1	1,493	100.0	5,473	100.0	1,662	100.1	607	100.0	2,269	100.1	7,742	100.1

*Denotes less than .1 percent.

SUPREME COURT OF THE UNITED STATES

No. 87-5765

Kevin N. Stanford,
Petitioner

v.

Kentucky

ON PETITION FOR WRIT OF CERTIORARI TO THE Supreme
Court of Kentucky.

ON CONSIDERATION of the motion for leave to proceed
herein *in forma pauperis* and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed *in forma pauperis* be, and the same is hereby,
granted; and that the petition for writ of certiorari be,
and the same is hereby, granted.

October 11, 1988

SUPREME COURT OF THE UNITED STATES

No. 87-5765

Kevin N. Stanford,
Petitioner

v.

Kentucky

"The order of October 11, 1988, granting the petition for a writ of certiorari is amended as follows:

"The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question VIII presented by the petition. The case is set for oral argument in tandem with No. 87-6026, *Wilkins v. Missouri*, in place of No. 87-5666, *High v. Zant*."

October 17, 1988

8

No. 87-5765

Supreme Court, U.S.
FILED

DEC 19 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

KEVIN N. STANFORD,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Kentucky

BRIEF FOR PETITIONER

J. DAVID NIEHAUS
Deputy Appellate Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District
Public Defender
Of Counsel

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800
Counsel for Petitioner
**Counsel of Record*

87 JPK

QUESTION PRESENTED

Does the imposition of the death penalty on a juvenile who was 17 years old at the time of the crime constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The Supreme Court of Kentucky affirmed the petitioner's convictions and death sentence in a published opinion on April 30, 1987. *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781 (1987). (Joint Appendix, J.A., 113-138).

No written opinion was rendered by the Ninth Division of the Circuit Court of Jefferson County, Kentucky. However, the final judgment entered by said court is reproduced in the Joint Appendix at 108-112. The Juvenile Division of the District Court of Jefferson County, Kentucky rendered findings of fact in its order transferring jurisdiction of the petitioner's case to Jefferson Circuit Court pursuant to Ky. Rev. Stat. (KRS) 208.170. (J.A. 7-10).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Kentucky Supreme Court was rendered on April 30, 1987, and that court denied a timely petition for rehearing on September 3, 1987. (J.A. 139). The petition for writ of certiorari was filed on November 2, 1987, and was granted on October 11, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Evidence Concerning The Crimes

In the early morning hours of January 8, 1981, Jefferson County police officers found the body of a 20 year old white female, Baerbel Poore, in the back seat of her car. (TE III, 400-401).¹ Ms. Poore had been sexually assaulted and had sustained a non-fatal gunshot wound to the left side of the face and a fatal gunshot wound to the right side of the head near the ear. (TE III, 363-364; TE VI, 809). The previous evening, Ms. Poore's mother had reported her missing from her job as a service station attendant. (TE III, 399-400; TE VII, 931-934, 939-940). The service station had been ransacked and two gallons of gas, a 2-gallon gas can, \$143.07 in cash and 300 cartons of cigarettes were taken. (TR VII, 934, 942-946).

The police discovered that the cigarettes were being sold by Owen Smyzer and Alexis Sloan. (TE III, 407; TE IV, 456-457). Sloan said the petitioner told him on January 8, 1981, that he stole the cigarettes from the service station and that a friend of his killed the female attendant. (TE VII, 1010-1023). Sloan divided the cigarettes with Smyzer and they sold them. (TE VII, 1011-1012). On January 13, 1981, the petitioner was interviewed by the police about the cigarettes. He denied having any knowledge about them and was released. (TE III, 408-409; TE IV, 516-518).²

Following the petitioner's release, Owen Smyzer gave a statement implicating the petitioner in the sale of the cigarettes. A "pick-up" was issued for the petitioner to be arrested for receiving stolen property over \$100.00. He was arrested later on the evening of January 13, 1981. (TE III, 409-410). On

¹ References to the Trial Transcript of Evidence are made TE, Volume and Page. References to the transcripts from other hearings are made TE, Date, Volume, and Page. References to the state court clerk's record are made (TR).

² The petitioner requested and was provided with appointed counsel during the interview. (TE Suppression Hearing, TE Supp. Vol. I, 15-18).

January 14, 1981, some keys belonging to the service station were found during a search of the apartment where the petitioner and his mother, Barbara Boller, resided (TE III, 473-478, 495).

Information was developed from the petitioner that Calvin Buchanan may have been involved in the crimes. On January 16, 1981, Calvin allowed the police to tape record a telephone conversation between him and his 17 year old nephew, David Buchanan. On the basis of that conversation, the police went to David's home and took him to police headquarters to be questioned about the crimes. (TE III, 410-412; TE IV 478-479; 532-533).

David told the police that he wanted to clear Calvin and was arrested after he made an oral statement implicating himself in the crimes. (TE III, 417-420; TE IV, 481-486). From David Buchanan, the police learned that a third black juvenile, Troy Johnson, was also involved. A search warrant was obtained for the residence of Johnson's brother, George Wilson. There police recovered a gun that was alleged to have been used in the crime. A two gallon gas can which was identified as the one taken from the service station was recovered from a field adjacent to Wilson's residence. Johnson was arrested after the search. (TE III, 420-421; TE IV, 487-490).

B. Juvenile Court Proceedings

Formal proceedings were initiated against the petitioner, David Buchanan, and Troy Johnson in the Juvenile Session of the Jefferson District Court. The prosecution moved, pursuant to KRS 208.170, to transfer the cases of the petitioner and Buchanan to Jefferson Circuit Court.³ The juvenile court transferred jurisdiction of the petitioner's case on October 28, 1981 and found that appropriate treatment programs for the

³ That version of KRS 208.170 which was in effect at the time of the crimes alleged herein is set out in the Appendix (App. 1a at p. 1a-2a) to this brief.

petitioner existed outside Kentucky. (J.A. 7-10). The court further stated (J.A. 8-10):

Kevin Stanford was born August 23, 1963 . . . [T]he Court finds that he has a low internalization of the values and morals of society and lacks social skills. That he does possess an institutionalized personality and has, in effect, because of his chaotic family life and lack of treatment, become socialized in delinquent behavior. That he is emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and reality based therapy for socialization and drug therapy in a residential facility. . .

The court discussed the petitioner's prior placements in juvenile facilities and noted:

His progress has been marginal in each based in part on the failure of the County and State to provide meaningful therapy for the child or after care intervention when he was returned after a relatively short time in each placement, to the streets of Jefferson County. His progress was basically that he learned how to behave enough to meet the minimal criteria for release each time approximately or roughly 6 months after placement then cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated.

As to the reason (sic) of prospects of rehabilitation in facilities available to the District Court Juvenile Session, other than the possibility of a bridge status commitment to the State Department of Human Resources with a minimum of approximately six months in an institution, the only facilities for a youth or child of his age with his problems would be out of state placements in specialized long term programs for youth, as per proof the child may benefit from such placement. However, the Court lacks statutory basis to order the state to provide such institutionalization for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation, and the State of Kentucky Department of Human Resources does not, nor does Jefferson County provide a meaningful alternative.

The court then concluded that it was in the best interests of the community and the petitioner to transfer his case to circuit court.

C. Circuit Court Proceedings

1. Pre-Trial Proceedings

The petitioner and David Buchanan were indicted in November, 1981. (TR 81CR1218, 1-3). The petitioner filed a motion requesting the Jefferson Circuit Court to transfer his case back to juvenile court (J.A. 11-15). The petitioner, who is black, presented evidence concerning his amenability to treatment and the racially discriminatory application of Kentucky's transfer statute, KRS 208.170. (J.A. 26-41; App. 2 a-e at pp. 11a-16a). The petitioner also filed a motion which asserted that imposition of the death penalty on a person who was a juvenile at the time of the crime violated the Eighth and Fourteenth Amendments. (J.A. 18-19).

As to the petitioner's amenability to treatment, testimony was given by Dana Mattison and Linda Luking. Mr. Mattison was a psychotherapist with a Jefferson County social service agency and met the petitioner in July-August, 1980. He believed that the petitioner was amenable to treatment and that he needed a one-on-one type treatment program. Earlier treatment programs were unsuccessful because they employed confrontational group treatment and were dysfunctional because they never addressed his particular therapeutic needs as based upon the available psycho-social and psychological information. Moreover, the petitioner was not getting any support from his home environment which was essential for him to succeed in a treatment program. (TE 3/1/82, 112-119, 134-135). The treatment program which the petitioner needed was not available in Kentucky but existed elsewhere and could be implemented in a presently operating Kentucky facility. (*Id.* 124-125, 132).

Linda Luking met the petitioner when she was doing a social work field placement at the Juvenile Detention Center in

Louisville from January to April, 1981. She continued to act as his counselor on a weekly basis from April to December, 1981. (TE 3/1/82, 152-154). The petitioner's childhood was lonely because of his mother's lack of attention and he had a history of substance abuse and needed treatment. (*Id.* 159-164). She considered the petitioner amenable to treatment because of behavioral changes she observed while she was working with him. (*Id.* 155, 163-164).

The petitioner's motion to transfer the case back to juvenile court was denied. (TE 3/1/82, 182-184; J.A. 42-44).

The co-defendant, David Buchanan, filed a motion that he not be subjected to the death penalty. It was premised on his assertion that the petitioner had actually done the shooting. The motion was granted because the prosecution conceded that *Enmund v. Florida*, 458 U.S. 782 (1982), precluded the death penalty for the "non-triggerman". (J.A. 54-59). In response, the petitioner renewed a prior motion for a separate trial from Buchanan (J.A. 60-61) and also filed another motion to preclude the death penalty as a possible punishment. (J.A. 63-64).⁴ The motions were denied. (TE I, 34; J.A. 62, 65, 69-70). The petitioner and Buchanan were jointly tried in Jefferson Circuit Court.

2. Evidence Introduced at Trial

A. Guilt-Innocence Phase

Troy Johnson testified as a prosecution witness and in exchange his case remained in juvenile court. *Buchanan v. Kentucky*, ___ U.S. ___, 107 S.Ct. 2906, 2909 n.2, 97 L.Ed.2d 336 (1987). (TE VII, 1029). Johnson was sent to a juvenile camp for nine months. (*Id.* 1048).

⁴ The prior motion for a separate trial was based on the petitioner's inability to cross-examine Buchanan and the introduction of evidence against Buchanan that would be inadmissible against the petitioner. (J.A. 16-17). The motion was denied. (TE 3/1/82, 184-196).

On January 7, 1981, Buchanan talked to him about robbing the service station where Ms. Poore worked and asked Johnson to supply him with a gun. Johnson gave Buchanan his brother's gun and some ammunition. Buchanan then called the petitioner and he and Johnson drove to the petitioner's apartment. Johnson said he waited in his car while Buchanan and the petitioner went into the service station. (TE VII, 1030-1034).

About 30 minutes later, Buchanan returned to Johnson's car with a gas can. He said he had sex with the service station attendant. He and Johnson followed a car that left the service station and when it stopped, Buchanan got out of Johnson's car and said he was going to have more sex with the woman. Johnson heard a shot and said he saw the petitioner leaning toward the driver's side of the other car. As Johnson started his car, he heard a second shot and said the petitioner was still leaning inside the car. (TE VII, 1035-1038). Johnson noticed that another car was behind his vehicle. The petitioner and Buchanan got into his car and they drove away. He said the petitioner gave the gun back to him and he let him out of the car near the service station. Johnson and Buchanan then drove back to Johnson's brother's house. Johnson removed two shells from the gun and threw them and the gas can onto a vacant lot next to the house. (TE VII, 1038-1042).

Kerise Ison and Amona Dorsey were riding together on the night of January 7, 1981. At Oboe Drive and Shanks Lane, a car that was blocking the intersection backed away from Ms. Dorsey's car. Ms. Ison heard gunshots and both women saw two men walking away from another car. The men walked past Ms. Dorsey's car and got into the other car. The women then drove away. (TE VII, 954-960, 964-968, 983-988). At a line-up, both women identified Calvin Buchanan as one of the men they saw. (TE IV 534-536; TE VII, 970-972, 991-992; TE Supp., Vol. II, 167-169, 182). Neither woman identified the petitioner as one of the men they saw that night.

Over the objection of the petitioner, a police officer testified about what Buchanan, who did not testify, told him about the

crimes. (TE IV 482-483).⁵ The police officer identified Buchanan and Troy Johnson by name and referred to the third participant as "the other person". (TE 484-486).⁶

The prosecutor also introduced evidence from two jail guards that the petitioner made an incriminating statement to each of them on separate occasions. (TE VIII, 1063, 1080-1082). A fingerprint of the petitioner was obtained from the victim's car. (TE I, 708; TE VII, 915-917). Hairs from black persons were found on the victims body and articles of her clothing. (TE VI, 804-811). Although some of the hairs were said to have originated from the petitioner, Buchanan, or from someone whose hair demonstrated the same characteristics, the prosecution's expert testified that hair comparisons do not constitute a basis for a positive, personal identification. (*Id.* 804-812, 826). There was no other physical or scientific evidence which connected the petitioner to the murder and sex offenses.

In his closing statement, the prosecutor urged the jury not to convict Buchanan of intentional murder because he argued that the evidence showed the petitioner did the shooting. (TE IX, 1332, 1336). The jury rejected that plea and convicted Buchanan and the petitioner of intentional murder, first degree robbery and first degree sodomy. The petitioner was also convicted of receiving stolen property. The jury recommended that he serve sentences of 20 years, 20 years and 5 years, respectively, on the latter three charges. (TE IX, 1346-1348; TR 82CR0406, 241, 244-246, 269, 274-276).⁷

⁵ The record does not reflect that the jury was admonished that Buchanan's statement was not to be used as evidence against the petitioner.

⁶ In the statement, Buchanan told the police that he and "the other person" took turns "raping and sodomizing" the victim. (TE IV, 485). That statement is the only direct evidence of the sexual offenses.

⁷ Buchanan was also convicted of first degree rape. He was sentenced to life imprisonment on the murder and 3 consecutive 20 year prison terms on the other crimes. (TR 82CR0406, 371-373).

B. Penalty Phase

The defense presented testimony from nine witnesses. George Boller, the petitioner's stepfather, was divorced from the petitioner's mother, Barbara Boller, when the petitioner was 13 years old. He resided with Mr. Boller for a short time after the divorce. Mr. Boller described the petitioner as a well-behaved child until he underwent a noticeable change around the age of 12 when he began to use drugs regularly. He was not the same boy Mr. Boller had known in the past. (TE X, 1383-1392). They were unable to communicate because of the drug problem and the petitioner could not get along with Mr. Boller's other children. (*Id.* 1391). The petitioner's drug use was becoming more frequent and was particularly bad in November and December, 1981. Mr. Boller attributed the change in the petitioner's personality and behavior to his increasing use of drugs. (*Id.* 1386-1392).

The petitioner spent most of his life with his aunt, Gertrude Dennison. He was an only child but he got along well with her children. However, his relationship to his mother was very distant. He was not able to talk and communicate with his mother but would talk to Ms. Dennison about his problems. (TE X, 1430-1431). She learned that the petitioner was using drugs when he was 13 or 14. His drug usage caused him to become more distant from her. (*Id.* 1432).

James Berry met the petitioner while he was in his class at the Juvenile Employment Skills Program of the Louisville Urban League. He testified that the petitioner was not very verbal and tended to keep matters to himself. He believed that the petitioner's mother and home environment did not provide him with adequate support but the petitioner was reluctant to talk about his home life. He believed that the petitioner could be rehabilitated. (TE X, 1419-1425).

Lloyd Davis, a vocational instructor at the Kentucky Children's Home in Jefferson County, met the petitioner while he was working at another juvenile facility, Rice-Audubon Treatment Center, where the petitioner was a resident. He found

the petitioner to be very withdrawn and confused about his sexual identity. According to Mr. Davis, the Rice-Audubon facility dealt more with group treatment and that juveniles who needed more individualized treatment could obtain it in the penal system. The petitioner was distant from his treatment group at Rice-Audubon and he did not receive any treatment for the confusion about his sexual identity. Mr. Davis, who spent a year in a Kentucky penal institution, believed the petitioner would benefit from the adult penal system. (TE X, 1465-1469).⁸

Mr. Dana Mattison, the Central Intake Supervisor for Diagnosis and Assessment for the Ohio Children's Services Board, also testified. He had previously been employed as a psychotherapist for a social service agency in Jefferson County, Kentucky and had been the director of the Juvenile Employment Skills Project of the Louisville Urban League. He met the petitioner when he entered the program in August, 1980. (*Id.* 1405-1406). The petitioner exhibited a lack of social interaction skills and a history of drug abuse and had problems being reintegrated into the community because of the lack of support systems available to him. (*Id.* 1407-1408).

When the petitioner entered the Employment Skills Project, the program made numerous, unsuccessful attempts to contact his mother. When she was finally contacted, it was noted that her level of supervision of the petitioner was limited due to her work hours and because of "a very dysfunctional relationship between [them]." (*Id.* 1408).

From the time that the petitioner was released from the Rice-Audubon Treatment Center until the time he became involved with the Employment Skills Project, there was "a steady deterioration back into the whole drug abuse syn-

⁸ The petitioner also offered evidence at the penalty phase of the trial from Mr. Steven Smith, who was the Director of Operations with the Kentucky Department of Corrections. Mr. Smith testified about the vocational, educational, and rehabilitative programs offered within the Kentucky penal system. (TE X, 1379-1383).

drome." (*Id.* 1408). The petitioner received no support from his mother and remained in the program until his arrest in January, 1981. (*Id.* 1409).

Mr. Mattison believed that the petitioner was capable of being rehabilitated and that there were a number of programs available throughout the United States. (*Id.* 1409-1410). He believed that the petitioner demonstrated "a lack of the basic nurturing that most people get in their earlier years" and explained that nurturing is a very specific concept in the social sciences and "deals with the kinds of interaction between mother, child, and/or significant others in their environment, that allow a person to feel secure in what they think, how they feel, and how they deal with those feelings which obviously translate into behaviors." (*Id.* 1411). A breakdown in the nurturing process could result in dysfunctional behavior. (*Id.* 1411-1412). The petitioner also needed counseling for a "major propensity" for drug abuse and usage. (*Id.* 1412).

Linda Luking testified that the petitioner, as early as the age of six, was having difficulty developing social relationships. He was confused as to who was his mother and who was his aunt. The petitioner did not have sufficient bonding with his mother and was unable to obtain it from any other source. He experienced isolation partly because his mother worked and was not home very often. (*Id.* 1440-1442). Although the petitioner had a positive family experience when he resided with his stepfather and his stepfather's family, by the age of 12, he had a serious problem with drug addiction. (*Id.* 1441-1442).

Ms. Luking focused on the petitioner's early childhood experiences and memories, the identification of present emotional issues and recognition of the underlying causes, and behavioral control of his reactions to those issues. (*Id.* 1439-1440). Prior to the age of six, the petitioner lived with a grandmother who, because of her physical limitations, had limited ability to come in contact with other people. Consequently, the petitioner lived an isolated existence and had a dog for his only companion. Although he received adequate health care, his early child-

hood inhibited his ability to develop social relationships. (*Id.* 1440).

The petitioner's drug problem eventually drove him from his stepfather's house and he returned to his mother's residence. (*Id.* 1442). During the course of her counseling relationship with the petitioner, Ms. Luking began to notice a substantial change in him. At first, he was difficult to work with but he eventually attained an honor status in the Juvenile Detention Center and his schoolwork began to improve. He began putting in extra time doing some reading, he began writing for the monthly newsletter, he began to voluntarily participate in various projects and demonstrated some interest in the GED program. (*Id.* 1443-1445).

Ms. Luking believed that the petitioner demonstrated rehabilitative potential and was in need of further counseling. In her words, "I saw the beginnings of a desire. I saw him begin to be willing to look at some of those painful pieces in his life. And, I saw a beginning to get in touch with that and work on that a little bit." (*Id.* 1446). She saw the petitioner demonstrate a consistent willingness to look at issues surrounding "a lifetime of rejection". (*Id.* 1447-1448).

On the prosecution's motion, the trial judge, over the objection of defense counsel, excluded the testimony of Robert Jones, a former Kentucky death row inmate who met the petitioner in 1979, while working as a counselor at the Juvenile Detention Center. Jones would have offered testimony about the vocational, educational, and rehabilitation opportunities in the Kentucky penal system and how the petitioner could benefit from them. (TE X 1483-1500; J.A. 72-87).

The prosecution offered no proof during the penalty phase. The jury was instructed on 20 mitigating circumstances and two statutory aggravating circumstances (first degree robbery and first degree sodomy).⁹ (J.A. 99-102; TE XI, 1504-1506; TR

⁹ The statutory mitigating and aggravating circumstances are set forth in KRS 532.025(2)(a) and (b).

82CR0406, 307-309). The jury was instructed that it could consider as a mitigating circumstance, "[t]hat at the time of the offense Kevin Stanford was of a very youthful age in light of the fact that he was only 17 years old." (J.A. 100; TE XI, 1504; TR 82CR0406, 308). The jury imposed the death penalty on the murder conviction. (J.A. 104; TE XI, 1542; TR 82CR0406, 314).

At sentencing, the petitioner moved the court to impose a sentence less than death. (J.A. 105-107; TR 82CR0406, 385-387). The petitioner's mother, stepsister, stepbrother, another youth and a clergyman made statements requesting the trial court to spare the petitioner's life. The clergyman also presented a petition signed by 400 persons requesting that the petitioner's life be spared. (TE Sentencing, 7-14). The trial court denied the petitioner's motion and sentenced him to death by electrocution for the murder. (*Id.* 29). The petitioner was also sentenced to 55 years imprisonment on the robbery, sodomy, and receiving stolen property convictions. (J.A. 108-111; TE Sentencing, 29-31; TR 82CR0406, 401-404).

SUMMARY OF ARGUMENT

Society has recognized the qualitative difference between juveniles and adults. That recognition is manifested by numerous laws which restrict the rights and conduct of juveniles. The underlying premise of those laws is that juveniles lack the maturity, the social and emotional development, and the cognitive skills to assume the responsibilities of adulthood and to exercise the same degree of reasoned moral judgment that is expected of adults. For nearly all intents and purposes, society has established the age of 18 as the boundary between childhood and adulthood. So pervasive is society's regulation of the lives of juveniles that "evolving standards of decency" prohibit the imposition of capital punishment on a person who was under the age of 18 at the time of committing a crime. The objective criteria by which evolving standards of decency are determined support no other conclusion.

Moreover, the imposition of the death penalty does not advance the deterrence and retribution rationales of capital

punishment. The emotional and psychological immaturity of adolescents preclude them from fully understanding the nature of their actions and appreciating their consequences. Adolescence is a time of life marked by an invincible sense of self and an absence of fear. Death, in any form, is only the most remote of possibilities. Execution for a criminal act is even less likely. Peer pressure and family environment subject adolescents to enormous psychological and emotional stress and they respond by acting impulsively and without the mature judgment expected of adults. These characteristics are shared by all adolescents, even 17 year olds like the petitioner. Thus, the possibility of capital punishment has no deterrent effect.

The extent of retribution depends upon one's culpability. Society holds juveniles less morally culpable for their acts than adults because juveniles are subjected to many internal and external pressures over which they have no control. The responsibility for juvenile crime is shared by the social and educational systems and the adolescent's home and family environment. The death penalty as retribution is thus excessive when imposed on a juvenile who, like the petitioner, is found to be amenable to treatment by the juvenile court but for whom no adequate treatment program exists in the state's juvenile justice system.

The petitioner's case demonstrates that currently existing statutory and due process safeguards in capital sentencing procedures do not provide adequate protection for a 17 year old juvenile. Society treats juveniles as a class, not as individuals, and governs their rights and conduct with inflexible laws. Death penalty jurisprudence focuses on "individualized consideration" of the accused and the offense. Thus, there is fundamental inconsistency in these two approaches, the latter of which is inadequate to protect juveniles from arbitrary imposition of the death penalty.

For example, mitigating circumstances are intended to eliminate arbitrary death sentences. However, "youth" or "age" as mitigating circumstances are hollow safeguards because in very few jurisdictions do they inform the sentencing body of

the "great weight" that a juvenile's age is intended to carry as mitigation. "Youth" as a mitigating circumstance is a sliding scale which applies with equal force to a 16 year old or to a 30 year old. "Age" as a mitigating factor pertains equally to young and elderly defendants. Although the jury was instructed that the petitioner was only 17 at the time of the alleged offenses, it was never informed what consideration that fact should have on the sentencing decision and, in view of the absence of written findings, it was impossible to determine what, if any, weight the petitioner's age was given as a mitigating factor.

Furthermore, most statutes which allow juvenile courts to transfer cases to adult courts do not articulate any standard of proof to govern the determination of whether the transfer criteria have been met and, if so, whether the juvenile should be transferred to adult court. The lack of any standard of proof vests the juvenile court with unbridled discretion which lends itself to arbitrary decision making that forces the juvenile to bear the risk of error. The petitioner's death sentence resulted from arbitrariness in the transfer proceeding because the juvenile court found him to be emotionally immature and amenable to treatment. However, treatment was not provided to him by the juvenile justice system and he was not even given the opportunity for treatment in the adult penal system. Due process requires the state to provide the petitioner with the treatment to which he is amenable and not to execute him.

Finally, the petitioner's death sentence must be vacated because Kentucky did not have a minimum age for capital punishment at the time the crime was committed.

ARGUMENT

I. THE IMPOSITION OF THE DEATH PENALTY ON A JUVENILE WHO WAS SEVENTEEN YEARS OLD AT THE TIME OF COMMITTING A CRIME VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Contemporary society recognizes fundamental differences between juveniles and adults that are manifested in numerous

laws which restrict a juvenile's ability to exercise the same rights and privileges enjoyed by adults. These laws reflect a considered judgment that 18 is the dividing line between childhood and adulthood. People over 18 are expected to have the maturity and judgment necessary to assume the responsibilities, rights and privileges of adults and they are treated accordingly. Persons under 18 are not deemed capable of exhibiting those qualities. Society, by its laws, considers them to be children and treats them as such. The age barrier erected by society is absolute and treats juveniles as a class and not as individuals. On one side of the boundary stand adults and on the other side stand children. There is no middle ground. His age prevents him from being an adult or being treated as an adult. Society's regulation over the lives and rights of juveniles is so pervasive that prevailing constitutional standards require that capital punishment be prohibited for a youth who was under the age of 18 years at the time of committing a crime.

The legal system's treatment of juveniles mirrors the special status they have been afforded by society.¹⁰ See *Kent v. United States*, 383 U.S. 541 (1966) and *Application of Gault*, 387 U.S. 1 (1967). Each state has enacted a juvenile justice system which shares the same objectives as society for the treatment of juveniles, i.e. protection, nurturing, guidance, and development. *Kent*, 383 U.S. at 554 n.19. Even if there are instances in which society is justified in transferring juvenile offenders to the adult legal system, the death penalty is such an extreme and thorough repudiation of what is sought to be accomplished by society, the juvenile justice system, and the adult penal system, that its imposition on one who was under 18 at the time

¹⁰ The majority of the states (37 and the District of Columbia) set the age of 18 as the limit on juvenile court jurisdiction. Davis, *Rights of Juveniles* (2d. Ed), see Appendix (App.) B. Wyoming sets the age of 19 as the limit on juvenile court jurisdiction. (*Id.* at App. B-25). Eight states (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, South Carolina and Texas) set jurisdiction at the age of 17 (*Id.* App. B-5, 7, 10, 12, 14, 21-22) and four states (Connecticut, New York, North Carolina and Vermont) set jurisdiction at the age of 16. (*Id.* App. B-3, 16-17, 23).

of committing a crime violates "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

A. Evolving Standards of Decency

The decision of whether a particular punishment violates the Eighth Amendment is rooted in an analysis which "should be informed by objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). *Enmund v. Florida*, 458 U.S. 782, 788 (1982). An Eighth Amendment analysis requires examination of "relevant legislative enactments", the sentencing decisions of juries, *Thompson v. Oklahoma*, ___ U.S. ___, 108 S. Ct. 2687, 2691-2692, 101 L. Ed.2d 702 (1988) (plurality opinion), "international opinion", and "the historical development of the punishment at issue". *Enmund*, 458 U.S. at 788. These objective factors are essential in determining evolving and contemporary standards of decency. *Thompson*, 108 S.Ct. at 2692 (plurality opinion).

1. Legislative Enactments

The judicial system and state legislatures have recognized the particular vulnerability of children as well as their inherent inability to function in the same responsible manner as is expected of adults. Legislation restricting children's abilities to exercise the same rights and privileges as adults is intended not only to protect children from themselves but also to protect society from the consequences of their immature judgment and impulsive and irresponsible behavior.

The societal and legal distinctions drawn between adults and juveniles rest on a solid foundation.

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the for-

mative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). "Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring).

[T]he experience of mankind, as well as the long history of our law, recogniz[es] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. Lopez, 419 U.S. 565, 590-591 (1975) (Powell, J. dissenting). (emphasis original). There are three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. at 634; The paternalistic role assumed by the State stems from a recognition that juveniles are not expected to exercise the same control over impulses or the same reasoned and mature judgment as adults. "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . .". *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

These principles have been embodied in numerous laws which deny juveniles some of the most fundamental rights and privileges enjoyed by adults. For example, in all 50 states and the District of Columbia, the right to vote is extended only to those citizens who have attained a minimum age of 18 years old. *Thompson v. Oklahoma*, 108 S.Ct. at 2701 (Appendix A).¹¹ No

¹¹ The number of states will include the District of Columbia unless otherwise noted.

state permits anyone below the age of 18 years to serve on a jury. *Id.* 108 S. Ct. at 2701-2702 (Appendix B). Forty-four states, including Kentucky (KRS 2.015), define a "minor" as being a person under the age of 18. Five states set the age of majority as being over the age of 18. Two states (Missouri and New York) do not have a uniform age of majority. (See Appendix A, Brief of Florida Collateral Capital Representative as *Amicus Curiae*).¹²

Kentucky places numerous restrictions on the lives and conduct of persons under the age of 18. For example, they cannot vote (Ky. Constitution § 145), purchase or possess alcoholic beverages (KRS 2.015; KRS 244.085) or sit on a jury (KRS 29A.030).¹³ Age restrictions are also imposed on the ability to hold public office¹⁴ or engage in certain occupations.¹⁵ These restrictions on juveniles are objective factors which reflect society's considered judgment that a 17 year old boy or girl is still a child, not an adult. Society has drawn a bright line between childhood and adulthood. We live on either side of that line and do not become adults until we cross the threshold of the age barrier which society has erected.

Society's recognition of the fundamental differences between juveniles and adults extends to capital punishment. Thirty-six states permit capital punishment.¹⁶ In 19 of those states "capital punishment is authorized but no minimum age is expressly stated in the death penalty statute." *Thompson v. Oklahoma*, 108 S.Ct. at 2694-2695 n.26. However, that fact alone does not

¹² See Appendices D-J in *amicus* brief of Florida Collateral Capital Representative for other restrictions on juveniles.

¹³ See App. 3c at p. 19a-20a for a list of other restrictions Kentucky places on juveniles.

¹⁴ See App. 3a at 17a.

¹⁵ See App. 3b at 18a.

¹⁶ See NAACP Legal Defense and Educational Fund, Inc. (hereafter LDF), *Death Row U.S.A.*, (8-1-88), p. 1. It appears that Vermont's maximum sentence for first degree murder is life without parole. Title 13, Vt.Stat. Ann. § 2303 (Supp. 1988).

support the conclusion that those states necessarily intended to bring juveniles under the age of 18 within the purview of their capital punishment statutes. *Thompson*, 108 S.Ct. at 2711 (O'Connor, J., concurring).

Of the 18 states which set a minimum age for the imposition of capital punishment, 12 preclude the execution of a juvenile who was under the age of 18 at the time of the crime, three set the minimum age at 17, and three other states set the minimum age at 16.¹⁷ Thus, 27 states and the District of Columbia prohibit the execution of a person who was under the age of 18 at the time of the offense.¹⁸ This rejection of the imposition of the death penalty for juveniles is not confined to the United States but extends to the international community as well. See *Thompson*, 108 S.Ct. 2696 and Appendix A-1 - A-7 of *Amicus Curiae* brief filed by Amnesty International, which sets forth a list of 180 countries and their positions on capital punishment.¹⁹ Most countries (143) prohibit capital punishment for juveniles. (App. 5 at p. 23a).²⁰ "[O]f the thousands of executions recorded by Amnesty International throughout the world between January, 1980 and May, 1986, only eight in [five] countries were reported to have been of people who were under 18 at the time of the crime. . .". Amnesty International, *The Death Penalty*, p. 74 (1987). The impact of the international community's consensus on the execution of juveniles is striking for two reasons. First, the universal rejection of capital punishment for juveniles transcends the political, geographic, eco-

¹⁷ See *Thompson v. Oklahoma*, 108 S.Ct. at 2695-2696 n.30; App. 4 at pp. 21a-22a to petitioner's brief. Congress has recently amended § 408 of the Controlled Substances Act (21 U.S.C. 848) and has exempted persons under the age of 18 from imposition of capital punishment for certain drug related killings. 134 Cong. Rec. H11172 (10-21-88) and S7580 (6-10-88).

¹⁸ Recent public opinion polls also reflect opposition to imposition of the death penalty on juveniles. See Streib, *Death Penalty for Juveniles*, 30-34.

¹⁹ The petitioner has summarized their data in App. 5 at p. 23a.

²⁰ The United States has ratified one and signed two other international treaties which prohibit the death for any person who commits a crime under the age of 18. *Thompson*, 108 S.Ct. at 2696-2697 n.34 (plurality opinion).

nomic, cultural, racial and religious differences that otherwise separate the nations of the world. Second, it constitutes an objective indicia of society's evolving standards of decency.

The views of the international community and the majority of jurisdictions in this country are also shared by "respected professional organizations." *Thompson*, 108 S.Ct. at 2696 (plurality opinion). The American Law Institute's Model Penal Code contains a prohibition against capital punishment on persons under the age of 18 years at the time the offense was committed.²¹ The National Council of Juvenile and Family Court Judges on July 14, 1988, passed Resolution No. 2 which opposed "capital punishment of those who committed an offense while under the age of eighteen years." The American Bar Association (ABA) also opposes the imposition of the death penalty on juveniles, (See *Thompson*, 108 S.Ct. at 2696 n.32), and *Amicus Curiae* brief filed in this case). The ABA's opposition to any juvenile death penalty is significant since it has not voiced unqualified opposition to the imposition of capital punishment on adults. (*Amicus* brief of ABA, p. 11).

The three objective criteria examined above thus support the conclusion that the imposition of capital punishment on juveniles contravenes "evolving standards of decency" and cannot be reconciled with the fundamental values held by our society.

2. Jury Determinations

Another "societal factor . . . in determining the acceptability of capital punishment . . . is the behavior of juries." *Thompson v. Oklahoma*, 108 S.Ct. at 2697; *Enmund v. Florida*, 458 U.S. at 3372. With regard to the imposition of capital punishment, "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." *Gregg*

²¹ ALI Model Penal Code, § 210.6, Commentary at 133 (Official Draft and Comments, 1980); *Thompson v. Oklahoma*, 108 S.Ct. at 2696 n.33 (plurality opinion).

v. *Georgia*, 428 U.S. 153, 181 (1976). Thus, it is "important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker v. Georgia*, 433 U.S. at 596 (plurality opinion).

While juries infrequently impose the death penalty on adults, available data reflects that juries are even more reluctant to sentence a juvenile to death. Indeed, the infrequency with which the death penalty is imposed on juveniles creates not only a presumption of arbitrariness of any juvenile's death sentence but also demonstrates that contemporary society rejects the notion of the death penalty as an appropriate punishment for a juvenile.²² Since 1890, juveniles (persons under 18 at the time of the offense) comprised 210 (2.5%) of the 8,544 persons executed in this country. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Clev.St.L.Rev. 363, 380—Table 2 (1986).²³ From "1982 through 1986 an average of 16,000 persons were arrested for . . . murder and non-negligent manslaughter each year." *Thompson*, 108 S.Ct. at 2697. Streib, *Death Penalty for Juveniles*, pp. 28-29, Table 2-2 (1987); App. 7 at pp. 25a-26a. Death sentences were imposed on 1.6% of the adults who were arrested on those charges. A significantly smaller percentage

²² Notwithstanding the value of considering jury verdicts as a measurement of contemporary society's attitudes, it must be remembered that death penalty juries do not encompass a certain segment of the population that opposes capital punishment. As the *amicus* brief filed by NLADA and NACDL (pp. 10-11, n.5) correctly notes, death penalty juries exclude those citizens whose opposition to capital punishment renders them unqualified for jury service under the standards enunciated in *Wainwright v. Witt*, 469 U.S. 412 (1985) and *Lockhart v. McCree*, 476 U.S. 162 (1986).

²³ Since January, 1977, three males have been executed for crimes committed when they were under 18 years of age. One (Charles Rumbaugh, age 17 - Texas) volunteered for execution. The other two juveniles (James Roach, age 17 - South Carolina and Jay Pinkerton, age 17 - Texas) apparently did not challenge the constitutionality of the death penalty for persons who were under the age of 18 years at the time the offense was committed. See Streib, *The Eighth Amendment and Capital Punishment for Juveniles*, 34 Clev.St.L.Rev. at 381; Streib, *Death Penalty for Juveniles*, 121-130; Brief of *Amicus Curiae*, Collateral Capital Representative at pp. 29-30 n.67.

(.04%) comprised the number of juveniles who received the death penalty. From 1982 through the end of 1987, 1,731 persons were sentenced to death. (App. 6 at p. 24a). During that same period of time, death sentences were imposed on 40 juveniles. (App. 7 at pp. 25a-26a).²⁴ Juveniles thus comprise approximately 2.3% of those persons sentenced to death from 1982 through 1987. There are presently 2,110 persons under a sentence of death in the United States. Of that number, 31 (29 males and 2 females) are juveniles.²⁵ Thus, juveniles comprise approximately 1.46% of the total death row population. This data reflects a difference in the way juries recommend the imposition of capital punishment on juveniles and adults and supports the conclusion that contemporary sentencing juries reject the death penalty as an appropriate sentence for a youth who was under 18 at the time of the offense.

Kentucky has not executed a person who was under the age of 18 at the time the offense was committed since 1945. There have been seven juvenile executions in Kentucky in this century: four were for rape—two were for murder— and one involved multiple murders and rape. Streib, *Death Penalty for Juveniles*, 196. Since *Furman v. Georgia*, 408 U.S. 238 (1972), only two Kentucky juveniles, the petitioner and Todd Ice, have been sentenced to death.²⁶ Ice's sentence and conviction were

²⁴ Professor Streib supplied counsel for the petitioner with information that two juveniles (Troy Dugar, age 15 - Louisiana and Wilbur Lamb, age 17 - Florida) were sentenced to death in 1987. See App. 7 at pp. 25a-26a. Two juveniles (Paula Cooper and Troy Dugar) listed in App. 7 at p. 26a, appear to fall within the parameters of *Thompson v. Oklahoma* because they were 15 yrs. old at the time of their crimes which occurred in states that did not then set a minimum age for the imposition of capital punishment (Indiana and Louisiana, respectively). See *Thompson*, 108 S.Ct. at 2695-2696 n.26 and n.30. Those death sentences should therefore be vacated.

²⁵ LDF, *Death Row*, U.S.A. (8-1-88).

²⁶ In recent years four other juveniles in Kentucky have faced the possibility of capital punishment. Three of them were allowed to plead guilty to sentences less than death. (Robert Green (age 16) and Alvin Forrest (age 17)-Jefferson County, Indictment 159102 and Pearl Stepp (age 14)-Harlan County, Indictment No. 78CR001). The fourth juvenile, Tommy Bowling, was

reversed. *Ice v. Commonwealth*, Ky., 667 S.W.2d 671 (1984). On retrial, Ice was convicted of first degree manslaughter and sentenced to 20 years imprisonment.²⁷ Kentucky's experience demonstrates that contemporary society rejects the death penalty as an appropriate sentence for juveniles.

The history of our country's treatment of juveniles, society's recognition of the substantial differences between juveniles and adults, and examination of the objective criteria for determining evolving standards of decency, support the conclusion that imposition of capital punishment on a person who was under 18 at the time of the crime violates the Eighth and Fourteenth Amendments.

B. Legitimate Objectives Of Punishment Are Not Served By The Execution Of Persons Who Were Under The Age Of 18 At The Time Of The Crime. —

"The death penalty serves two principal social purposes: retribution and deterrence of capital crimes by prospective offenders". *Gregg v. Georgia*, 428 U.S. at 183. "Unless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. at 798 citing *Coker v. Georgia*, 433 U.S. at 592. The expressed objectives of capital punishment are not served by the execution of a youth who was under 18 at the time of the crime.

1. Deterrence

That contemporary juries seldom impose the death penalty on juveniles is "a fact which further attenuates its possible

tried by a jury in Powell County (Indictment No. 79CR025) and was sentenced to 20 years imprisonment. Bowling's adult half-brother was tried separately and sentenced to death. See *White v. Commonwealth*, Ky., 671 S.W.2d 241 (1984). See *Amicus Curiae* brief filed by Kentucky Youth Advocates et al. in *Eddings v. Oklahoma*, 80-5727, p. 10, n.6.

²⁷ See Louisville Courier-Journal, February 25, 1986.

utility as an effective deterrence." *Enmund*, 458 U.S. at 800. There is no deterrence from the fact that capital punishment for juveniles is authorized by some states, because there is only a remote possibility that it will become a reality. Indeed, the plurality in *Thompson*, noted the lack of deterrent value that the death penalty has on juveniles. *Id.* 108 S.Ct. at 2700. See also Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind.L.J. 757, 788-790 (1986).

The deterrence rationale for a juvenile death penalty is non-existent because juveniles, as a class, display an absence of fear and appreciation of the long-term consequences of their actions. Those latter characteristics are hardly surprising in light of the "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Thompson*, 108 S.Ct. at 2698. Indeed, those characteristics are by-products of the emotional and psychological immaturity so common among adolescents. Normal adolescence is a time of life marked by an absence of fear which is fueled by the adolescent's own sense of invulnerability. Caught between adulthood and childhood, they inevitably wrestle with their own identities and engage in conduct that is marked by a lack of judgment and psychological and emotional immaturity. Adolescents frequently try to prove their adulthood by exhibiting childlike behavior, often with fatal consequences.²⁸ "The adolescent lives in an intense present; 'now' is so real to him that past and future seem pallid by comparison." *Id.* 108 S.Ct. at 2699 n.43 citing Kastenbaum, *Time and Death in Adolescence*, in *The Meaning of Death*, 99, 104 (H. Feifel ed. 1959). "'Risk-taking with body safety is common in the adolescent years, through sky diving, car racing, excessive use of drugs and alcoholic beverages. . . .'" *Thompson*, 108 S.Ct. at 2699 n.43 citing

²⁸ For example, teenagers comprise a disproportionate number of alcohol-related traffic accidents as compared to the rest of the population. See remarks of Sen. Bumpers, 130 Cong. Rec. - Senate 8239 (June 26, 1984); Sen. Huddleston, *Id.* at 8241; and Sen. Chafee, *Id.* at 8243.

Gordon, *The Tattered Cloak of Immortality*, in *Adolescence and Death*, 16, 27 (C. Coor and J. McNeil eds. 1986). The fear of death thus has little, if any, deterrent value to adolescents not only in terms of the criminal justice system but also as a matter of everyday life.

Society does not expect juveniles to exercise the same rational and reasoned judgment expected of adults. By its laws, society has codified and underscored the cognitive, psychological, emotional, and developmental differences between adults and juveniles. This recognition of the causes and effects of adolescent behavior, as well as the infrequency with which juveniles are sentenced to death and executed, renders the deterrence rationale for capital punishment inapplicable to juveniles who are under 18 at the time the crime was committed.

2. Retribution

Retribution "as an expression of society's moral outrage at particularly offensive conduct" is not a "forbidden objective" of our society. *Gregg v. Georgia*, 428 U.S. at 183. However, the degree of retribution is to be commensurate with the individual's own culpability. *Enmund v. Florida*, 458 U.S. at 798-800. "Adolescence is well recognized to be a time of physiological and psychological change and stress. Normal adolescents are distinguished from adults by their intensity of feeling, immature judgment, and impulsiveness." Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145, Am. J. Psychiatry, 584-588 (May, 1988). See also Streib, *Death Penalty for Juveniles*, 184-185. These characteristics of "normal" adolescents are surely exacerbated in juveniles who have, like the petitioner, experienced severe emotional deprivation and neglect from a parent throughout their lives. Adolescence is conservatively viewed as lasting from the age of 11 through 18. Hamburg and Wortman, *Adolescent Development and Psychopathology*, in *Psychiatry* 5-8 (J. Cavener ed. 1985). Thus, the internal and external pressures that are brought to

bear on a youth are not fleeting but endure throughout a substantial portion of that young life. Society's strict regulation of the lives of juveniles is a recognition that they are subjected to the psychological and emotional characteristics of adolescence for a number of years and can be expected to act accordingly. The imposition of the death penalty, society's most extreme sanction, is therefore inconsistent with the recognized effects and consequences of adolescent behavior.

This Court has emphasized the importance of youth as a reason to spare a juvenile's life because they are less mature and thus less responsible for their acts than adults. *Eddings*, 455 U.S. at 115-116. See also Note, 61 Ind.L.J. 757, 785-788 (1986). Juveniles are more vulnerable to influence, peer pressure and psychological damage. They are more impulsive. Our socio-economic and educational system as well as home and family environment share the responsibility for the behavior of juveniles. *Eddings*, 455 U.S. at 115 n.11 citing Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, 7 (1978). Thus, "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson*, 108 S.Ct. at 2698 (footnote omitted).

Juveniles are less responsible for their acts than adults because they "are less mature in their ability to make sound judgments" and "less mature in terms of their moral development . . ." and "are less able to control their conduct and to recognize the consequences of their acts than are adults." 74 *J.Crim.L. and Criminology* 1471, 1493 (1983). Society bears a greater responsibility for the crimes of minors than for those of adults. The main characteristic shared by juveniles who commit serious crimes is membership in a family that provides inadequate supervision and guidance and in which there are conflicts, disharmony and poor parent-child relationships. *Id.* at 1495 (footnote omitted). An adult is better situated to eliminate or diminish the factors that contribute to criminal behavior than a juvenile who is less capable of extricating

himself from his immediate environment because he is dependent upon his family and the social system for his everyday existence. If either or both of these entities contribute to a juvenile's behavior, age makes it impossible for the juvenile to break the cycle. A juvenile's lack of maturity and underdeveloped ability to reason and respond rationally to stressful situations serve only to exacerbate a difficult living situation and may thus prompt criminal behavior.

Transfer of a juvenile's case to adult court does not necessarily mean that a juvenile is considered to be as morally accountable as an adult or that society is any less responsible for the juvenile's criminal conduct. It is neither a statement that a juvenile is beyond rehabilitation "[n]or is it evidence that the minor is more mature than his peers or is able to control his conduct and understand the consequences of his actions." *Id.* at 1499. Transfer decisions "reflect the inadequacies of the system" (*Id.* at 1500) and cannot be premised on the assumption that the juvenile should be subjected to capital punishment, especially where the juvenile, like the petitioner, is amenable to treatment and rehabilitation.²⁹ This conclusion is consistent with the recognition that "incurability is inconsistent with youth". *Workman v. Commonwealth*, Ky., 429 S.W.2d 374, 378 (1968). In *Workman*, the imposition of a sentence of life without parole on a 14 year old boy who was convicted of rape, constituted cruel and unusual punishment. The same conclusion was reached with regard to a 16 year old boy. *Anderson v. Commonwealth*, Ky., 465 S.W.2d 70 (1971). The ruling was not extended to adults because "juveniles have historically been labeled as a separate class." *Fryrear v. Commonwealth*, Ky., 507 S.W.2d 144, 146 (1974). "[I]t is impossible to make a judgment that a [juvenile], no matter how bad, will

²⁹ In the order transferring jurisdiction to adult court, the juvenile court judge noted the petitioner's "chaotic family life and lack of treatment". The judge found the petitioner "emotionally immature" and "amenable to treatment". (J.A. 9). He further found that appropriate treatment programs for the petitioner existed only outside of Kentucky but he lacked the "statutory basis to order the state to provide such institutionalization. . ." (J.A. 10).

remain incorrigible for the rest of his life." *Workman*, 429 S.W.2d at 378. "It seems inconsistent that one would be denied the fruits of the law, yet subjected to all its thorns." *Id.* at 377.

The "possibility of significant character and behavioral changes in young adults ages eighteen to twenty-five is a recognized phenomenon". 74 *J.Crim.L. and Criminology* at 1514. (Citation omitted). "For most adolescents age alone is the cure of criminality." F. Zimring, *Background Paper*, in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime*, at p. 37 (1978); J. Wilson and R. Herrnstein, *Crime and Human Nature*, 144 (1985). Thus, a lengthy prison term is adequate retribution for the crimes committed by juveniles because the recidivism rate for juvenile murderers is "very low" and they "tend to be model prisoners."³⁰

Juveniles are not only less morally culpable than adults but also are susceptible to the influence of peer groups and pressures. *Thompson*, 108 S.Ct. at 2699.³¹ Thus, the death penalty for juveniles does not advance the objectives of deterrence and retribution and does not make any "measurable contribution to acceptable goals of punishment." *Coker v. Georgia*, 433 U.S. at 592 (plurality opinion); *Enmund v. Florida*, 458 U.S. at 798.

The deterrence and retribution justifications for the death penalty are especially inapplicable in the petitioner's case. Society, by its considered judgment, has established the age of 18 as the boundary between childhood and adulthood. Seventeen year olds, like the petitioner, fall on the childhood side of the dividing line. By society's standards, he is a child, not an adult. He manifests the same qualities of adolescents as younger juveniles. He is vulnerable, immature, susceptible to the

³⁰ Streib, Eighth Amendment and Capital Punishment for Juveniles, 34 *Clev.St.L.Rev.* at 395.

³¹ Indeed, the petitioner became involved in the crime only after he was contacted by David Buchanan who, along with Troy Johnson, planned the robbery and obtained the gun with which to commit it. (TE VII, 1030-1034).

psychological influences of his family and peers, and a product of his upbringing and his home environment.

The petitioner's immaturity was specifically recognized by the juvenile court which also acknowledged his "chaotic family life" (J.A. 9), to which the State routinely returned him following each placement in a juvenile facility. The juvenile court noted that the county and the state failed "to provide meaningful therapy for the [petitioner] or after-care intervention." (J.A. 9). In each juvenile facility placement, the petitioner met "the minimal criteria for release". (J.A. 9). He was then "cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated." (J.A. 9).

The petitioner's chaotic home life began at an early age. There is no mention in the record about his natural father. The petitioner spent his early years living with other relatives which caused him to become confused as to who was really his mother. (TE X, 1440-1442). His mother's absence from the home deprived him of the basic nurturing and bonding that children need with their parents. (*Id.* 1411, 1440-1442). His early childhood was a lonely and isolated existence that impaired his ability to develop social relationships. (*Id.* 1407-1408, 1440-1442). The petitioner's aunt recognized the problems existing in the relationship between the petitioner and his mother. (*Id.* 1430-1431). The psychological influence and emotional deprivation that the petitioner necessarily experienced from his mother's neglect resulted in "a lifetime of rejection". (*Id.* 1447-1448). The relationship between the petitioner and his mother was described as "dysfunctional". (*Id.* 1408).

Thus, the petitioner lacked what every child needs, loving and supportive parents who provide guidance and stability. His mother's neglect and rejection obviously left the petitioner with an emotional and psychological void. He was caught in a vicious circle from which he could not escape. He would be placed in a juvenile facility that would fail to provide him with

any meaningful treatment (J.A. 9) and upon his release he returned to a "chaotic family life". (J.A. 9). Mr. Mattison and Mr. Berry noted the lack of cooperation and support given to the petitioner by his mother while he was in their Employment Skills Project. (*Id.* 1408-1409, 1424-1425). Whatever progress the petitioner made in treatment programs was destined to fail because of his home environment. As an adolescent, the petitioner was not emotionally or psychologically equipped to handle the internal stress necessarily engendered by the dysfunctional relationship with his mother. His increasing drug abuse is a typical adolescent response to his environment. (*Id.* 1412, 1432, 1441-1442).

In spite of this background, the petitioner still manifested the amenability to treatment and rehabilitative potential recognized by the juvenile court. (J.A. 9-10). When Linda Luking began counseling the petitioner in the Juvenile Detention Center, he was difficult to work with and resisted her efforts. (*Id.* 1443). When she persisted and gave the petitioner the attention and guidance that he needed, he responded as any adolescent would, he blossomed. There was a noticeable change in his behavior. His schoolwork improved. He began doing extra reading and wrote for the newsletter. He demonstrated interest in the GED program and volunteered to participate in various projects. (*Id.* 1444-1445). The petitioner's development is a manifestation of his adolescence. Even at the age of 17, he shared traits common to all other adolescents and responded to his problems and environment in an adolescent fashion. While adolescence may be a transitional period, it is not adulthood. Society has drawn a bright, dividing line between juveniles and adults. Thus, the imposition of capital punishment on a juvenile who is under 18 at the time of the crime was committed is excessive and disproportionate and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment.

C. The Petitioner's Death Sentence Violates The Eighth And Fourteenth Amendments Because Juveniles Who Are Transferred To The Adult Court System And Ultimately Face Capital Punishment Are Not Afforded Sufficient Due Process To Protect Them Against the Arbitrary Imposition Of The Death Penalty.

The petitioner urges the Court to rule that the Eighth and Fourteenth Amendments prohibit the imposition of capital punishment on a juvenile who was under 18 at the time of committing a crime. Any doubts the Court may have about whether the line should be drawn at 18 or whether 17 year olds should be treated like adults for capital punishment purposes evaporate when present statutes and procedures are examined. The Court must insist on strict standards and procedural safeguards to avoid arbitrary imposition of the death penalty. Since society treats 17 year olds as juveniles, the Court cannot categorically place them under the umbrella of adulthood for purposes of capital punishment. There is substantial doubt about whether a 17 year old can be treated as an adult because he is still in the stage of adolescence in which significant emotional and psychological development occurs. It is well-recognized that the cognitive skills and maturity of juveniles are not the same as those of adults. The doubts must be resolved in the juvenile's favor and constitute the rationale for augmenting the constitutional protections afforded the juvenile in capital sentencing proceedings.

As the petitioner's case demonstrates, the protections given adolescents by the juvenile justice system evaporate when they are thrust into adult court. The due process safeguards at work in the adult justice system are inadequate to protect juveniles because they fail to draw any distinctions between adults and juveniles. Society treats juveniles as a class and not as individuals when it comes to laws governing their behavior. For example, a juvenile under the age of 18 cannot vote under any circumstances. His ability to vote is not dependent upon his maturity, level of intelligence, or his moral and emotional development. The law is inflexible, absolute, and its application

— cannot be waived by individual circumstances. The same is true of other laws which restrict the ability of juveniles to engage in certain conduct. (See App. 3a-c at pp. 17a-20a).

Death penalty jurisprudence demands an "individualized consideration" of the facts and circumstances surrounding the accused and the offense in order that an appropriate sentence can be imposed. *Enmund v. Florida*, 458 U.S. at 798 citing *Lockett v. Ohio*, 438 U.S. at 605. Thus, the linchpin of death penalty jurisprudence runs contrary to the approach society has taken in its treatment of juveniles. This fundamental inconsistency should be resolved in favor of banning capital punishment for juveniles who are under 18 at the time they commit the crime because the adult justice system does not afford juveniles adequate due process safeguards against the arbitrary imposition of capital punishment.

The accused's ability to present mitigating evidence is the primary safeguard against arbitrary imposition of the death penalty. For example, Kentucky specifies "[t]he youth of the defendant at the time of the crime" as a mitigating circumstance. KRS 532.025(2)(b)(8). This mitigating circumstance is a hollow safeguard because a juvenile is not statutorily afforded any more consideration than is any other young person. "[G]reat weight"³² must be given to "the special mitigating factor of youth,"³³ But the special status of youth as a mitigating circumstance is lost in the plain language of death penalty statutes like Kentucky's.

"Youth" as it is used in KRS 532.025(2)(b)(8) is not an absolute term. It necessarily operates on a sliding scale and applies with equal force to a defendant who is 16 years old as well as to a 30 year old defendant. No legal distinction is made between those two defendants and all those between their ages. Thus, jurisdictions like Kentucky which specify youth as a mitigating circumstance do not afford juveniles adequate due process

³² *Eddings v. Oklahoma*, 455 U.S. at 115-116.

³³ *Thompson v. Oklahoma*, 108 S.Ct. at 2698 (plurality opinion).

protections which are warranted by their age.³⁴ These statutes undercut the importance of a juvenile's age as mitigation. Rather than being the significant, pervasive factor of the case, the juvenile's age shares the same status as any other mitigating circumstance. Indeed, it has been held that a defendant's young age "is not a constitutional distinction" between juveniles and adults. *Ice v. Commonwealth*, 667 S.W.2d at 680. Such a ruling is inconsistent with the *Eddings*' requirement that a juvenile's age carry "great weight" as mitigation. If a mitigating circumstance treats juveniles as young adults, then it ignores the true essence of youth.

Whatever protection may be afforded juveniles in the states which list "youth" as a mitigating circumstance is further diluted in those states which either provide that the defendant's "age" is a mitigating factor³⁵ or do not specifically enumerate mitigating circumstances.³⁶ In the latter six jurisdictions, the juvenile's age has no particular significance as a mitigating circumstance. In the ten states where "age" is a mitigating factor, juveniles share equal footing with young adults and elderly defendants whose advanced age can also be considered as mitigating evidence. Thus, these capital punishment statutes are constitutionally infirm because they do not provide for due consideration of the "great weight" that a juvenile's age is to carry as a mitigating circumstance.³⁷

The petitioner's case presents a compelling example of how "youth" as a mitigating factor can be rendered meaningless by

³⁴ See App. 8 at p. 27a. Of the 8 states which list youth as a mitigating circumstance only Indiana, Montana, and South Carolina specifically require consideration of the defendant's age if he was less than 18 at the time of the crime.

³⁵ See App. 9 at p. 28a.

³⁶ See App. 10 at p. 29a.

³⁷ Indeed, the Kentucky Supreme Court did not afford the petitioner's age any more consideration than any other mitigating factor. "[The petitioner's] age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him." *Stanford v. Commonwealth*, 734 S.W.2d at 792. (J.A. 136).

the exclusion of mitigating evidence that is designed to show his rehabilitation potential in the adult penal system. The trial judge in this case excluded penalty phase testimony from Robert Jones, a former death row inmate in Kentucky. (TE X, 1498; J.A. 87).³⁸ After his release from prison, Jones worked as a youth counselor at the Juvenile Detention Center in Louisville and became acquainted with the petitioner several years before his arrest in this case. Jones also spoke with the petitioner about a month prior to his trial in the case at bar. (TE X, 1489-1491; J.A. 76, 79). Jones testified about the educational, vocational, and rehabilitative programs offered by the adult penal system in Kentucky and, based upon his knowledge of the petitioner, believed that he could benefit from those programs. (TE X, 1491-1497; J.A. 80-85).

The Kentucky Supreme Court upheld the exclusion of Jones' proffered testimony because "He had no academic or professional qualifications to allow him to offer opinion evidence. His personal knowledge of [the petitioner] was at best minimal and remote. What very little of his testimony which might conceivably be admissible, such as the rehabilitative prospects of the defendant, was cumulative." *Stanford v. Commonwealth*, 734 S.W.2d at 790 (J.A. 130-131). This restrictive view of mitigating evidence is inconsistent with the principles espoused in *Lockett* and *Eddings*.

The accused's capacity for rehabilitation must be admitted as mitigating evidence. *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Moreover, "academic or professional credentials" are not the only measure of one's expertise. Expertise "can be acquired by acquaintance with, or observation of, the subject matter"³⁹ or by actual experience.⁴⁰

³⁸ Jones was not permitted to testify before the jury. Kentucky Rule of Criminal Procedure (RCr) 9.52 provides for a procedure known as an avowal in which testimony, to which an objection is made, is presented to the trial court outside the presence of the jury for the trial judge's consideration and for review by an appellate court.

³⁹ *Lee v. Butler*, Ky. App., 605 S.W.2d 20, 21 (1979).

⁴⁰ *Kentucky Power Co. v. Kilbourn*, Ky., 307 S.W.2d 9, 12 (1957).

Under *Lockett*, *Eddings* and *Hitchcock*, Jones' testimony cannot be excluded even if it was "minimal and remote".⁴¹ The juvenile court's transfer order acknowledged the petitioner's rehabilitative potential. (J.A. 9-10). However, the arbitrary restriction on the presentation of mitigating evidence, stripped the petitioner of the ability to fully apprise the jury of that potential and thereby unfairly hampered his efforts to ensure that his youth was given due consideration by the jury.

Adult courts are ill-equipped to provide the strict review warranted by juvenile cases. Transfer to adult court strips the juvenile of his special status and provides nothing in return. This reality is in and of itself a reason why stricter constitutional safeguards must be implemented in proceedings which could expose 17 year olds to capital punishment. The fundamental differences between juveniles and adults are lost when a juvenile enters the adult court system which offers little or no protection from the arbitrary imposition of capital punishment. Safeguards such as mitigating circumstances are illusory protections because they provide no special treatment for a juvenile's case and do not achieve a constitutionally sufficient level of individualized consideration because they apply with equal force to juveniles and adults.

Abolition of the death penalty for juveniles, as a matter of Eighth Amendment jurisprudence, is consistent with society's theory and practice of dealing with juveniles and ensures that

⁴¹ Even an individual who has "minimal" knowledge of an accused's character or record, can offer mitigating evidence in the penalty phase of a capital trial. A witness may testify as to an unusual act of heroism or kindness by the accused and even if that individual's contact with the accused in that one instance lasts no more than a few seconds or minutes, it may well constitute the type of evidence that a jury would take into consideration for the imposition of a sentence less than death.

Similarly, remoteness is an inherently unjustifiable basis upon which to exclude mitigating evidence. If such a rule were to apply, then evidence as to the accused's upbringing and childhood would be excluded as being remote to the time when he is on trial as an adult. It is a matter of common knowledge that what an individual experiences as a child ultimately shapes his life as an adult. *Eddings v. Oklahoma*, 455 U.S. at 115-116.

the fundamental differences between juveniles and adults are taken into account when a juvenile case is transferred to adult court.

D. State Statutes Pertaining To The Transfer Of Juvenile Cases To Adult Courts Are Constitutionally Deficient Because They Do Not Specify What Burden Of Proof Applies.

Juvenile transfer proceedings must provide a certain degree of constitutional due process. *Kent v. United States*, *supra*. A crucial due process shortcoming in most transfer statutes is their failure to articulate any particular burden or standard of proof that must be established before a juvenile can be transferred to adult court. Only five states set forth any burden of proof regarding the criteria for transfer.⁴² Kentucky and seven other states merely require a showing of probable cause to believe the juvenile committed the crime and no particular evidentiary standard is ascribed to the transfer criteria.⁴³ Eleven states do not list any standard of proof for the transfer of juvenile cases to adult courts.⁴⁴

Juveniles who face capital punishment do so by operation of juvenile transfer statutes that lack any meaningful standards to guide the juvenile court's decision of whether to transfer the case to adult court. Those statutes are constitutionally deficient insofar as they fail to articulate an evidentiary standard or burden of proof on whether the transfer criteria have been met and whether the case should be transferred even if the transfer criteria have been established. Thus, juveniles, like the petitioner must bear the risk that an error is made either in

⁴² See App. 11 at pp. 30a-31a. Mississippi requires that the transfer criteria be proved by clear and convincing evidence. The other jurisdictions (Georgia, Louisiana, Montana and Pennsylvania) merely require that the transfer criteria be established by probable or reasonable cause.

⁴³ See App. 12 at p. 32a.

⁴⁴ See App. 13 at p. 33a.

the decision to transfer jurisdiction of his case or the ultimate decision to impose the death penalty.

A uniform standard of proof is constitutionally necessary to ensure that transfer decisions are based on identifiable criteria that are weighed and considered in a manner that engenders confidence in the reliability of the proceeding and its outcome. In criminal cases, the interests of the accused "have been protected by standards of proof designed to exclude . . . the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979). Consequently, the reasonable doubt standard has been utilized because "our society imposes almost the entire risk of error upon itself." *Id.* To eliminate the potential for arbitrariness in transfer decisions, due process requires that the reasonable doubt standard be implemented in transfer proceedings since it is the most effective means of reducing the margin of error which exists in all litigation because it requires the prosecution to shoulder the burden of persuading the factfinder. *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958); *In re Winship*, 397 U.S. 358, 364 (1970).

The "qualitative difference" between the death penalty and any other sentence calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. at 604. This enhanced level of reliability must exist not only at trial when a juvenile faces capital punishment but also must extend to the determination of whether he should be transferred to adult court in the first place. Society must be willing to bear the risk of error and adopt a standard of proof in transfer proceedings that is designed to enhance the reliability of the transfer decision and eliminate arbitrariness in the outcome. Accordingly, due process requires that the State prove beyond a reasonable doubt that the criteria for transfer have been met and that the interests of the juvenile are served by a transfer to adult court.

In the petitioner's case, the juvenile court's transfer order leaves no doubt that it could not be shown beyond a reasonable doubt that he had an adult-level of maturity and was not amena-

ble to treatment. (J.A. 9). Consequently, it was unconstitutional to expose him to the risk of capital punishment even if his case was transferred to circuit court. The due process safeguards created by application of the reasonable doubt standard should not be restricted to whether the criteria for transfer have been met in juvenile court but should also extend to the penalty phase of a capital trial.⁴⁵

To ensure that the risk of error is not borne by the juvenile, the jury must make findings concerning his amenability to treatment as well as his maturity and level of emotional and intellectual development. This procedure would ensure that juries understand the importance of youth as a mitigating circumstance and take into account the qualitative difference between juveniles and adults. The petitioner's case is a graphic example of the accused bearing the risk of error that the transfer determination and the imposition of the death penalty are erroneous.

As noted earlier, "youth" as a mitigating circumstance is a hollow safeguard because it applies with equal force to young adults. This problem is exacerbated in the petitioner's case because the jury made no written findings concerning the existence or non-existence of mitigating circumstances. (J.A. 103-104). Thus, it is impossible to tell what, if any, weight the jury ascribed to the mitigating circumstances (J.A. 99-102),⁴⁶ and the petitioner is forced to bear the risk of error.

⁴⁵ Indeed, the petitioner should at least be protected in a capital trial by a presumption that the death penalty is inappropriate because of his age and the jury should be instructed on that presumption.

⁴⁶ The petitioner tendered instructions that required the jury to make written findings as to whether or not the mitigating circumstances existed (J.A. 97) but they were not given by the trial court. (J.A. 99-104). Kentucky law does not require the jury to make written findings on whether mitigating circumstances exist or do not exist. *Smith v. Commonwealth, Ky.*, 599 S.W.2d 900, 912 (1980). However, that ruling is inconsistent with *Eddings v. Oklahoma*, 455 U.S. at 116 which requires that all relevant mitigating evidence be considered and weighed against the aggravating circumstances. Written findings are the only way to ensure that the finder of fact has performed this balancing test.

The petitioner also bore the risk of error in the proportionality review conducted by the Kentucky Supreme Court [KRS 532.025(3)(c)], which was fatally flawed because with one exception,⁴⁷ the petitioner's case was compared to cases involving adult defendants. *Stanford v. Commonwealth*, 734 S.W.2d at 793 and n.9; J.A. 137-138. The sparse information provided by the Kentucky Supreme Court in its proportionality review suggested that the predominant factor was the nature of the crime and that aggravating and mitigating circumstances in all the cases were considered and compared. *Id.*⁴⁸ A comparison to adult cases suggests that the petitioner's age was not given the "great weight" it was intended to carry and that the qualitative differences between adults and juveniles were ignored.⁴⁹ The comparison to the only other juvenile death penalty case, *Ice v. Commonwealth*, was meaningless because the bases of comparison were unidentified and unknown. Thus, the petitioner was forced to bear any risk of error in the comparison of capital cases.

The petitioner was also made to bear the risk of error that Kentucky's transfer statute (KRS 208.170) was being applied in a racially discriminatory manner. At a hearing in the circuit court, the petitioner presented evidence that showed that black juveniles were being treated more harshly than white juveniles by the juvenile justice system in Jefferson County. The petitioner introduced evidence which showed that between 1975 and 1979, 69.4% (27,066) of the total number of referrals to juvenile court were white youths and that 30.6%

⁴⁷ *Ice v. Commonwealth*, Ky., 667 S.W.2d 671 (1984).

⁴⁸ There is no indication of the methodology used by the Kentucky Supreme Court in its consideration and comparison of the mitigating and aggravating circumstances.

⁴⁹ Indeed, the Kentucky Supreme Court's opinion suggests that it paid mere lip-service to the petitioner's age as a mitigating circumstance. "His age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him." *Stanford v. Commonwealth*, 734 S.W.2d at 792; J.A. 136.

(11,914) were black youths. (J.A. 28-29; App. 2b at p. 12a).⁵⁰ Of the total number of cases referred to juvenile court, the cases of 10,596 (39.1%) white juveniles were handled informally as opposed to the cases of 3,228 (27.1%) black juveniles. (J.A. 30-31; App. 2c at p. 14a).⁵¹ The cases of 16,470 (60.9%) white youths were handled by formal disposition in juvenile court as compared to cases of 8,686 (72.9%) black youths. (App. 2c at p. 14a). There were 56 grand jury referrals during the five year period, 18 of which were white juveniles (32.1%) and 38 were black juveniles (66.9%). (J.A. 31-32; App. 2b-2e at pp. 12a-17a). The petitioner's evidence indicated that the cases of black youths were submitted to the grand jury in a disproportionate ratio to the number of total referrals of black youths to the juvenile court. Yet, blacks accounted for the majority of offenders in only two of nine major felony categories (Homicide, 57.4% and Robbery, 58.1%; J.A. 32-35; App. 2a at p. 11a).

The Kentucky Supreme Court found the evidence about the racial disparity in grand jury referrals to be "disturbing", but did not believe that the evidence warranted "the conclusion that race is in any way a factor in the waiver process." (*Stanford v. Commonwealth*, 734 S.W.2d at 791; J.A. 133). Thus, the petitioner bore the risk of error as to whether the juvenile transfer statute was being applied in a racially discriminatory manner.

The absence of any evidentiary standard in transfer proceedings forces the juvenile to assume the risk of error. The case at bar demonstrates the compelling need for the Court to impose the reasonable doubt standard on transfer proceedings involving a juvenile who faces capital punishment when his case is

⁵⁰ The 1970 census indicated that the population of Jefferson County, Kentucky was 14% black and 86% white. United States Bureau of Census, Census of Population, 1970, Part 19—Kentucky, Table 16 (p. 19-45) and Table 24 (p. 19-70).

⁵¹ An informal disposition is one in which the juvenile meets with a court worker and the matter is handled on an informal basis and never is referred to court for a formal hearing. (J.A. 31).

transferred to an adult court. The absence of this safeguard renders the petitioner's death sentence arbitrary and capricious in violation of the Eighth Amendment.

E. Since The Petitioner Was Found Amenable To Treatment By The Juvenile Court, Due Process Requires That He Not Be Subjected To Capital Punishment.

The juvenile court transfer order stated (J.A. 9-10):

[The petitioner] is emotionally immature and could be amenable to treatment if properly done on a long-term basis of psychotherapeutic intervention and reality-based therapy for socialization and drug therapy in a residential facility . . . the only facilities for a youth . . . of his age with his problems would be out-of-state placement in specialized long-term programs for youth . . . However, the court lacks statutory basis to order the state to provide such institutionalization for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation . . .

Due process requires that the State not execute a juvenile who is deemed amenable to treatment but for whom the State offers no appropriate treatment program. Imposition of the death penalty in such a situation is indeed arbitrary especially where, as here, a treatment program does exist but it is not in the state of which the juvenile is a resident. Treatment cannot be denied simply because a state lacks the funds or the facilities to provide them to a needy juvenile. *Cf. Haziel v. United States*, 404 F.2d 1275 (D.C. Cir. 1968).⁵²

⁵² Kentucky is a poor state ranking 44th in *per capita* income and 45th in *per capita* taxes paid to state and local governments. Moreover, just slightly more than 50% of all adults in Kentucky have a high school education. This percentage is the lowest in the nation. See *The Louisville Courier-Journal Magazine*, Sunday, November 27, 1988, p. 14. Consequently, there is an element of arbitrariness inherent in the petitioner's case because his status as a resident of a poor state prevents him from receiving appropriate treatment to which he is amenable. The petitioner's execution is Kentucky's response to the State's inability to provide him with an appropriate treatment program.

The "right to treatment" doctrine "finds its basis in the due process clause of the Fourteenth Amendment." *Morales v. Thurman*, 364 F. Supp. 166, 175 (E.D. Tex. 1973) "The right to rehabilitative treatment for juvenile offenders . . . has been established in state and federal courts in recent years." *Nelson v. Heyne*, 491 F.2d 352, 358 (7th Cir. 1974). See also *Inmates of Boy's Training School v. Affleck*, 346 F.Supp. 1354 (D.R.I. 1972); *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Pena v. New York State Division for Youth*, 419 F. Supp. 203 (S.D. N.Y. 1976); and *Collins v. Bensinger*, 374 F. Supp. 273 (N.D. Ill. 1974). Thus, a juvenile's right to treatment is an accepted principle of constitutional law and due process requires that Kentucky provide the petitioner with the treatment to which he is amenable and preclude his execution.

It is indeed a cruel twist of fate for Kentucky to fail to provide the petitioner with 'meaningful therapy' or "after-care intervention" (J.A. 9), which eventually results in his transfer to adult court, and then seek to exact society's ultimate sanction from him because it failed to provide him with appropriate treatment. The imposition of the death penalty is arbitrary and constitutes cruel and unusual punishment, particularly when it is imposed on a juvenile, like the petitioner, who is deemed amenable to treatment but has never been given the opportunity to avail himself of the rehabilitation offered to adults by the justice and correctional systems. "[T]he extinction of all possibility of rehabilitation is one of the aspects of death that makes it different in kind from any other sentence a State may legitimately impose". *Gardner v. Florida*, 430 U.S. 349, 360 (1977). The petitioner's case is not one in which all possibility of rehabilitation has been extinguished. Thus, his death sentence is arbitrary and must be vacated.

F. At The Time The Petitioner's Case Was Transferred To Circuit Court, Kentucky Did Not Have A Minimum Age For Imposition Of The Death Penalty. His Death Sentence Must Therefore Be Vacated.

The murder for which the petitioner was convicted occurred on January 7-8, 1981. His age was 17 years and slightly more

than 4 months.⁵³ At the time of the alleged crime, KRS 208.170 (Eff. 7-15-80; App. 1a at 1a-2a) permitted 16 and 17 year old juveniles, who committed any felony, to be transferred to adult court. A juvenile under 16 could be transferred if he committed a Class A felony or a capital offense. The statute does not contain a minimum age for capital punishment.

In 1980, the Kentucky General Assembly enacted the Unified Juvenile Code which was to become effective July 1, 1982. (App. 1b at pp. 3a-4a). That legislation would have abolished capital punishment for juveniles and would have subjected them to imprisonment for a Class A felony.⁵⁴ (KRS 208F.040(1) (App. 1b at p. 4a). KRS 208.170 was to be repealed when the new legislation took effect. (KRS 202A.220, § 152; App. 1c at p. 5a).

In 1982, the Kentucky General Assembly passed legislation that postponed the effective date of the Unified Juvenile Code until July 15, 1984. (App. 1c at p. 5a).⁵⁵ The 1984 Kentucky General Assembly repealed the Unified Juvenile Code effective July 13, 1984. (App. 1c at p. 6a). On September 1, 1987, Kentucky set a minimum age of 16 for imposition of the death penalty. (KRS 640.040(1); App. 1d at p. 7a). KRS 208.170 was repealed on September 1, 1987. (App. 1d at p. 8a). Thus, from January 1, 1975, when KRS 208.170 was first made effective, until September 1, 1987, Kentucky allowed capital punishment to be imposed on juveniles regardless of their age.⁵⁶

⁵³ The petitioner's date of birth is August 23, 1963. (J.A. 8).

⁵⁴ A Class A felony carried a term of imprisonment of 20 years to life. See KRS 532.060(2)(a). A "youthful offender" was defined as "any person regardless of age, transferred to circuit court under the provisions of this Act." KRS 208A.020(40). App. 1b at 3a.

⁵⁵ Due to funding problems, the proposed juvenile code legislation of 1980 and 1982, including the abolition of capital punishment, never took effect and was ultimately repealed in 1984. See Louisville Courier-Journal, March 11, 1986.

⁵⁶ Prior to trial, the petitioner unsuccessfully argued that imposition of the death penalty was unconstitutional because of the uncertainty of the Kentucky law. (TE 3-1-82, 71-82; TR81CR1218, Vol. III, 414-416A; TR 82CR0406, 20-21, 159-160; TE1, 35; J.A. 48-53, 70).

The plurality and concurring opinions in *Thompson v. Oklahoma*, when read together require that the petitioner's death sentence be vacated because Kentucky did not set a minimum age for the imposition of capital punishment on juveniles. KRS 208.170 cannot be read as establishing 16 as a minimum age for the imposition of capital punishment on juveniles, because in 1984 the Kentucky Supreme Court held that it was not a violation of the Eighth and Fourteenth Amendments for a juvenile, who was 15 years old at the time he committed a murder, to be sentenced to death. *Ice v. Commonwealth*, *supra*, 667 S.W.2d at 679-680, reversed on other grounds.

Kentucky did not set a minimum age for the imposition of capital punishment on juveniles until September 1, 1987, long after the crime for which the petitioner was convicted and sentenced to death. Accordingly, *Thompson*, requires that the petitioner's death sentence be vacated.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, respectfully submits that the Court should rule that the imposition of capital punishment on juveniles who are under the age of 18 when they commit a crime violates the Eighth and Fourteenth Amendments of the United States Constitution. Accordingly, the judgment of the Kentucky Supreme Court should be reversed and the petitioner's death sentence should be vacated.

Respectfully submitted,

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office

200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800

Counsel for Petitioner
*Counsel of Record

J. DAVID NIEHAUS
Deputy Appellate Defender
Co-Counsel for Petitioner
DANIEL T. GOYETTE
Jefferson District
Public Defender
Of Counsel

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1a

APPENDIX 1a

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (p. 532)

Section 164. *KRS 208.170* is amended to read as follows:

(1) If, prior to an adjudicatory hearing in the juvenile *session of district court*, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

(3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

APPENDIX 1a

(5) When the juvenile *session of district court* so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile *session of district court*. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile *session of district court*.

(b) If an indictment is returned, the court may in its discretion order the case transferred to the juvenile *session of district court*.

(c) If an indictment is returned and the court does not transfer the case to juvenile *session of district court*, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

APPENDIX 1b

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (xxxvi)

Table 1—KRS Numbers and Headings

Section	Heading (Legislative History)	Page
Chapter 208F Youthful Offenders		
208F.040	Sentencing appropriate for Class A felony (en S 309, § 99, 7-1-82)	899

* * *

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (pp. 848, 851)

CHAPTER 280

(S.B. 309)

AN ACT relating to juveniles

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. KRS CHAPTER 208A IS ESTABLISHED AND A NEW SECTION THEREOF CREATED TO READ AS FOLLOWS:

208A. 340 *This Act shall be known as the Kentucky Unified Juvenile Code.*

SECTION 3. A NEW SECTION OF KRS CHAPTER 208A IS CREATED TO READ AS FOLLOWS:

208A.020 *As used in this Act unless the context otherwise requires:*

(40) "Youthful offender" means any person regardless of age, transferred to circuit court under the provisions of this Act.

* * *

APPENDIX 1b

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (p. 899)

SECTION 99. A NEW SECTION OF KRS CHAPTER 208F IS CREATED TO READ AS FOLLOWS:

208F.040 *(1) No youthful offender who has been convicted of a capital offense shall be sentenced to capital punishment, but instead shall be sentenced to a term appropriate for one who has committed a Class A felony.*

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from Section 86(2), (3), (4), or (5) of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 96 of this Act.

APPENDIX 1c

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (pp. 915-916)

SECTION 150. A NEW SECTION OF KRS CHAPTER 202A IS CREATED TO READ AS FOLLOWS:

Section 152. The following sections of the Kentucky Revised Statutes are repealed:

208.170 Proceedings against children suspected of felony.

* * *

BALDWIN'S KRS—1982 ACTS ISSUE (p. 852)

Chapter 284

(S.B. 282)

AN ACT relating to the Kentucky Unified Juvenile Code and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. Acts, 1980, Chapter 208, Section 153 is amended to read as follows:

This Act shall become effective on July 15, 1984 ~~[1, 1982]~~

Section 2. Whereas, 1980 Senate Bill 309 is scheduled to become effective on July 1, 1982, fifteen (15) days before the normal effective date of other legislation passed at the 1982 Regular Session of the General Assembly and would create a conflict therewith, an emergency is declared to exist and this Act shall become effective immediately upon its passage and approval by the Governor.

Approved April 2, 1982

* * *

APPENDIX 1c

BALDWIN'S KRS—1984 ACTS ISSUE (p. 521)

CHAPTER 184

(S.B. 54)

AN ACT relating to the Kentucky Unified Juvenile Code.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

[Eff. 7-13-84]

Section 1. Acts 1980, Chapter 280 and Acts 1982, Chapter 284 are repealed.

Section 2. It is the intent of the General Assembly that the amendments and repealers of Acts 1980, Chapter 280 not become effective and that statutes affected thereby remain as not amended or not repealed, except as affected by legislation other than Acts 1980, Chapter 280 and Acts 1982, Chapter 284 passed during the 1980, 1982, or this Act.

Approved April 3, 1984

APPENDIX 1d

BALDWIN'S KRS—1986 ACTS ISSUE (p. 1098)

SECTION 137. A NEW SECTION OF KRS CHAPTER 640 IS CREATED TO READ AS FOLLOWS:

640.040 Capital punishment and other prohibited dispositions [Eff. 7-1-87]

(1) No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit for parole for twenty-five (25) years.

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from subsection (2), (3), (4), (5) or (6) of Section 125 of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 129 of this Act.

* * *

APPENDIX 1d

BALDWIN'S KRS—1986 ACTS ISSUE (pp. 1120-1121)

Section 198. The following KRS sections are repealed:

208.170 Proceedings against children suspected of felony.
[Eff. 7-1-87]

* * *

208.170 Proceedings against children suspected of felony

(1) If, during the course of any proceeding in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the best interests of the child and of the public require that the child be tried and disposed of under the regular law governing crimes, the court in its discretion may make an order transferring the case to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) When the juvenile court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it may either return an indictment or may return a written report to the circuit court recommending that the child be committed to the department. If the court believes that such commitment would be proper, it may order the child committed to the department.

(b) If, during any stage of the trial in the circuit court, the child or his parent or guardian so requests, the judge in his discretion may stop the trial and commit the child to the department.

(c) If neither of the procedures specified in paragraphs (a) and (b) of this subsection are employed, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

APPENDIX 1d

(e) Any commitment to the department under paragraph (a) or (b) of this subsection shall be for an indeterminate period not to exceed the age of twenty-one (21).

HISTORY: 1974 H 232, § 308, eff. 1-1-75

1962 c 212, § 4; 1956 c 157, § 26; 1954 c 193, § 4; 1952 c 161, § 17

APPENDIX 1e

640.010 Preliminary hearing; proof required to try child as youthful offender in circuit court

(1) For children who are alleged to be youthful offenders by falling in the purview of KRS 635.020(2), (3), (4), (5), (6), or (7), the court shall at arraignment assure that the child's rights as specified in KRS 610.060 have been explained and followed.

(2) In the case of a child alleged to be a youthful offender by falling within the purview of KRS 635.020, the court shall upon motion by the county attorney to proceed under this chapter, conduct a preliminary hearing to determine if the child should be transferred to circuit court as a youthful offender. The preliminary hearing shall be conducted in accordance with the Rules of Criminal Procedure.

(a) At the preliminary hearing, the court shall determine if there is probable cause to believe that an offense was committed, that the child committed the offense, and that the child is of sufficient age and has the requisite number of prior adjudications, if any, necessary to fall within the purview of KRS 635.020.

(b) If the court determines probable cause exists, the court shall consider the following factors before determining whether the child's case shall be transferred to the circuit court:

1. The seriousness of the alleged offense;

2. Whether the offense was against persons, or property, with greater weight being given to offenses against persons;

3. The maturity of the child as determined by his environment;

APPENDIX 1e

4. The child's prior record;

5. The best interest of the child and community;

6. The prospects of adequate protection of the public; and

7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available to the juvenile justice system.

(c) If, following the completion of the preliminary hearing, the court is of the opinion, after considering the factors enumerated in subsection (b) of this section, that the child should be transferred to circuit court, the court shall issue an order transferring the child as a youthful offender and shall state on the record the reasons for the transfer. The child shall then be proceeded against in the circuit court as an adult, except as otherwise provided in this chapter.

(d) If, following completion of the preliminary hearing, the court is of the opinion, after considering the factors enumerated in subsection (b) of this section that the child shall not be transferred to the circuit court, the case shall be dealt with as provided in KRS Chapter 635.

(3) If the child is transferred to circuit court under this section and the grand jury does not find that there is probable cause to indict the child as a youthful offender, as defined in KRS 635.020(2), (3), and (4), but does find that there is probable cause to indict the child for another criminal offense, the child shall not be tried as a youthful offender in circuit court but shall be returned to district court to be dealt with as provided in KRS Chapter 635.

HISTORY: 1988 c 350, § 104, eff. 4-10-88 1986 c 423, § 134

APPENDIX 2a

Statistical Data Concerning Racial Composition of Juveniles Committing Various Offenses in Jefferson County, Kentucky 1975-1979*

—Introduced in Hearing 3/1/82 (TE 3-1-82, 93-97)

—See also J.A. 32-35

1. Assault	2. Homicide	3. Rape
W 371—51.1%	W 23—42.6%	W 53—53%
B 355—48.9%	B 31—57.4%	B 47—47%
726	54	100
4. Felonious Sex Offenses	5. Robbery	
W 41—61.2%	W 324—41.9%	
B 26—38.8%	B 450—58.1%	
67	774	
6. Burglary	7. Receiving Stolen Property Over \$100.00	
W 3174—64.6%	W 202—67.1%	
B 1740—35.4%	B 99—32.9%	
4914	301	
8. Wanton Endangerment I	9. Theft over \$100.00 ¹	
W 200—61.7%	W 1520—64%	
B 124—38.3%	B 855—36%	
324	2375	

* The statistics contained in Appendices 2a-e are taken from the 1975-1979 Annual reports of the Kentucky Department of Human Resources (DHR) and DHR business records which were introduced into evidence during the juvenile court proceedings and were utilized by John Metzler in his testimony in circuit court on March 1, 1982 (J.A. 28-36; TE 3/1/82, 88-98). This evidence was made part of the record on appeal in the Kentucky Supreme Court [see manila envelope marked Transcripts and Papers from Juvenile Court (Defense Exhibits 1-5)].

¹This category combines offenses listed as Grand Larceny or Theft Over \$100.00 (J.A. 34-35).

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APPENDIX 2b

Juvenile Referrals by Planning Service Community, Race and Year*

P.S.C.	Five Year Total					
	White		Black		Total	
	No.	%	No.	%	No.	%
1	322	16.5	1,625	83.5	1,947	100.0
2	1,904	66.5	958	33.5	2,862	100.0
3	85	9.5	811	90.5	896	100.0
4	1,019	45.9	1,200	54.1	2,219	100.0
5	137	6.1	2,127	93.9	2,264	100.0
6	380	15.7	2,041	84.3	2,421	100.0
7	230	27.3	612	72.7	842	100.0
8	1,004	83.1	204	16.9	1,208	100.0
9	2,154	89.7	247	10.3	2,401	100.0
10	3,032	91.1	296	8.9	3,328	100.0
11	3,927	96.9	126	3.1	4,053	100.0
12	3,300	94.1	206	5.9	3,506	100.0
13	4,078	79.6	1,042	20.4	5,120	100.0
14	2,008	94.6	115	5.4	2,123	100.0
15	1,514	93.8	100	6.2	1,614	100.0
Out of County	1,972	90.6	204	9.4	2,176	100.0
Total	27,066	69.4	11,914	30.6	38,980	100.0

*"Planning Service Community" is a specifically designed section of Jefferson County.

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APPENDIX 2b

Grand Jury Referrals by Planning Service Community, Race and Year

P.S.C.	Five Year Total					
	White		Black		Total	
	No.	%	No.	%	No.	%
1	0	—	8	100.0	8	100.0
2	2	40.0	3	60.0	5	100.0
3	0	—	3	100.0	3	100.0
4	1	16.7	5	83.3	6	100.0
5	0	—	4	100.0	4	100.0
6	2	22.2	7	77.8	9	100.0
7	0	—	2	100.0	2	100.0
8	1	100.0	0	—	1	100.0
9	3	100.0	0	—	3	100.0
10	3	75.0	1	25.0	4	100.0
11	2	100.0	0	—	2	100.0
12	2	66.7	1	33.3	3	100.0
13	0	—	3	100.0	3	100.0
14	0	—	0	—	0	—
15	1	100.0	0	—	1	100.0
Out of County	1	50.0	1	50.0	2	100.0
Total	18	32.1	38	67.9	56	100.0

Manner of Handling by Race and Year.

APPENDIX 2c

Year	White				Black							
	Formals		Informals		Total		Formals		Informals		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1979	3,254	59.5	2,219	40.5	5,473	100.0	1,667	73.5	602	26.5	2,269	100.0
1978	3,100	61.2	1,964	38.8	5,064	100.0	1,724	71.8	678	28.2	2,402	100.0
1977	3,186	62.2	1,935	37.8	5,121	100.0	1,726	74.0	605	26.0	2,331	100.0
1976	3,422	62.4	2,061	37.6	5,483	100.0	1,933	74.7	653	25.3	2,586	100.0
1975	3,508	59.2	2,417	40.8	5,925	100.0	1,636	70.3	690	29.7	2,326	100.0
Total	16,470	60.9	10,596	39.1	27,066	100.0	8,686	72.9	3,228	27.1	11,914	100.0

Year	Total					
	Formals		Informals		Total	
	No.	%	No.	%	No.	%
1979	4,921	63.6	2,821	36.4	7,742	100.0
1978	4,824	64.6	2,642	35.4	7,466	100.0
1977	4,912	65.9	2,540	34.1	7,452	100.0
1976	5,355	66.4	2,714	33.6	8,069	100.0
1975	5,144	62.3	3,107	37.7	8,251	100.0
Total	25,156	64.5	13,824	35.5	38,980	100.0

Homicide Referrals by Sex, Race and Year.

Year	White				Black			
	Male		Female		Male		Female	
	No.	%	No.	%	No.	%	No.	%
1979	4	44.4	0	0	5	56.6	0	0
1978	5	50.0	0	0	3	50.0	2	2
1977	3	23.1	0	0	9	76.9	1	1
1976	7	56.3	2	2	7	43.8	0	0
1975	2	33.3	0	0	4	66.7	0	0
Total	21	42.6	23	42.6	28	57.4	3	5.6

Homicide Referrals by Disposition and Year.

Year	Grand Jury				Delinquent Institution				Community Resources			
	F.A.W.L.*		Probation		Other		Total		F.A.W.L.*		Probation	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1979	4	44.4	2	22.2	2	22.2	1	11.1	0	0	0	0
1978	4	40.0	1	10.0	1	10.0	3	30.0	1	10.0	0	0
1977	5	38.5	2	15.4	3	23.1	2	15.4	1	7.7	0	0
1976	4	25.0	2	12.5	5	31.3	2	12.5	0	0	3	18.8
1975	1	16.7	1	16.7	3	50.0	0	0	1	16.7	0	0
Total	18	33.3	8	14.8	14	25.9	8	14.8	3	5.6	3	5.6

*Filed Away With Leave To Re-instate (dismissal without prejudice).

APPENDIX 2e

Grand Jury Referrals by Offense Category and Year.

Year	Major Property		Social Control		Persons (Phy. Harm)		Persons (No Harm)		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
1979	0	—	0	—	6	100.0	0	—	6	100
1978	4	26.7	1	6.7	9	60.0	1	6.7	15	100
1977	2	22.2	0	—	6	66.7	1	11.1	9	100
1976	5	45.5	0	—	6	54.5	0	—	11	100
1975	10	66.7	1	6.7	3	20.0	1	6.7	15	100
Total	21	37.5	2	3.6	30	53.6	3	5.4	56	100

APPENDIX 3a

AGE RESTRICTIONS ON
PUBLIC OFFICE HOLDERS IN KENTUCKY

Office	Age	Constitutional Or Statutory Authority
Governor	30	Ky. Const. § 72
Lieutenant Governor	30	Ky. Const. § 82
State Senator	30	Ky. Const. § 32
State Representative	24	Ky. Const. § 32
Treasurer, Auditor or Public Accounts, Register of the Land Office, Commissioner of Agriculture, Secretary of State, Attorney General and Superintendent of Public Education	30	Ky. Const. § 91
Commonwealth's Attorney, County Judge Executive County Attorney, Sheriff, Jailer, Coroner, Surveyor, Assessor, Justice of the Peace and Constable	24	Ky. Const. §§ 97, 99 and 100
County Clerk and Circuit Court Clerk	21	Ky. Const. §§ 97, 99 and 100
County Commissioner	24	KRS 67.063
Mayor	25	KRS 83A.040(1)
Member, Board for Louisville and Jefferson County Children's Home	25	KRS 201.020
Member, City Housing Authority	24	KRS 80.040
Member, City Legislative Body	21	KRS 83A.040(3)
Member, Local School District Board	24	KRS 160.180
Member, State Board of Education	30	KRS 156.040
Member, State Board of Elections	25	KRS 117.015

APPENDIX 3b

**AGE RESTRICTIONS ON OCCUPATIONS IN
KENTUCKY REQUIRES MINIMUM AGE OF 18
UNLESS OTHERWISE NOTED**

Occupation	Statute
Certification as school superintendent, principal, teacher, supervisor, director of pupil personnel or other public school position for which certification is required	KRS 161.040
Podiatrist	KRS 311.420
Dentist	KRS 313.040
Dental Hygienist	KRS 313.290
Pharmacist	KRS 315.050
Embalmer	KRS 316.030
Funeral Director	KRS 316.090
Barber	KRS 317.450
Cosmetologist	KRS 317A.050
Master or Journeyman Plumber	KRS 318.040
Optometrist	KRS 320.250
Veterinarian	KRS 321.260
Architect	KRS 323.040
Real Estate Broker or Associate	KRS 324.040
Certified Public Accountant	KRS 325.261(2)
Ophthalmic Dispenser	KRS 326.040
Handwriting Examiner	KRS 329.030
Auctioneer	KRS 330.070(1)
Own a Driver Training School or Act as a Driver Training Instructor (age 21)	KRS 332.030(1)(5) and (3), respectively
Hearing Aid Dealer and Fitter	KRS 334.050
Certified Social Worker	KRS 335.080(1)(a)
Social Worker	KRS 335.050(1)(a)

APPENDIX 3c

**KENTUCKY LAWS RESTRICTING
CONDUCT OF JUVENILES**

A juvenile [a person under 18—Ky.Rev.Stat. (KRS) 2.015] cannot:

1. Purchase candy or confections having a liquid filling or liquid containing alcohol—KRS 244.650.
2. Serve as a jury commissioner—KRS 29A.080(2)(a).
3. Work in the care and treatment of handicapped children—KRS 2.015.
4. Be a state police officer—KRS 16.040.
5. Be a member or employee of a county's police force—KRS 70.540.
6. Be a civil service employee—KRS 90.330.
7. Obtain a driver's license without parental consent—KRS 186.470.
8. Marry without parental consent—KRS 402.020(4); KRS 402.210.
9. Obtain employment to sell or produce alcoholic beverages—KRS 244.090.
10. Be a taxi driver or chauffeur of a vehicle for hire—KRS 281.726.
11. Enter a pool hall—KRS 436.320.
12. Pawn property—KRS 226.030.
13. Receive non-emergency dental and medical care without parental consent—KRS 214.185 and KRS 216B.400.
14. Participate in a professional boxing or wrestling match or exhibition—KRS 229.121.
15. Change his or her name—KRS 401.010. However, a parent can have a minor's name changed. KRS 401.020.

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16. Be administrator of an insurance plan, fund or group—KRS 304.9-052.
17. Be an agent or solicitor of insurance—KRS 304.9-105.
18. Execute an anatomical gift—KRS 311.175.

APPENDIX 4

JURISDICTIONS WITH MINIMUM AGE
FOR IMPOSITION OF CAPITAL PUNISHMENT

Age When Crime Committed	Jurisdiction
18	California (Cal. Penal Code § 190.5 (Supp. 1987))
	Colorado (Col. Rev. Stat. 16-11-103(1)(a) (Repl. 1986))
	Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (1985))
	Illinois (38 Ill. Ann. Stat. § 9-1(b) (Supp. 1988))
	Maryland (27 Md. Code § 412(f) (Supp. 1988))
	Nebraska (Nebr. Rev. Stat. § 28-105.01 (1985))
	New Hampshire (N.H. Rev. Stat. Ann. § 630:5 (XIII) (Supp. 1988)) (prohibiting execution of one who was a minor at the time of crime); <i>Id.</i> at § 21-B:1 (age of majority in New Hampshire is age 19), but see <i>Id.</i> at § 630:1(v) (prohibits holding anyone under age 17 to be guilty of a capital offense).
	New Jersey (N.J. Stat. Ann. §§ 2A:4A-22(a) (1987) & 2C:11-3g (Supp. 1988))
	New Mexico (N.M. Stat. Ann. §§ 28-6-1(A) (1987) & 31-18-14(A) (Repl. 1987))
	Ohio (Ohio Rev. Code Ann. § 2929.02 (1987))
	Oregon (Ore. Rev. Stat. §§ 161.620 & 419.476(1) (1987))

APPENDIX 4

- Tennessee (Tenn. Code Ann. §§ 37-1-102(3) (Supp. 1988), 37-1-103 (Repl. 1984), 37-1-134(a)(1) (Repl. 1984))
- 17 Georgia (Ga. Code Ann. § 17-9-3 (Supp. 1988))
- North Carolina (N.C. Gen. Stat. § 14-17 (Supp. 1988))
- Texas (Tex. Penal Code Ann. § 8.07(d) (Supp. 1988))
- 16 Indiana (Ind. Code Ann. § 35-50-2-3 (Supp. 1988))
- Kentucky (Ky. Rev. Stat. Ann. 640.040(1) (1987))
- Nevada (Nev. Rev. Stat. § 176.025 (1986))

APPENDIX 5

INTERNATIONAL RESTRICTIONS ON
CAPITAL PUNISHMENT

Source: *Amicus Curiae* brief filed by Amnesty International in *Wilkins v. Missouri*, 87-6026 (p. 24 & Appendix A1-A7—lists 180 countries).

34 countries preclude capital punishment in all cases (A-1—A-2).

20 countries limit capital punishment to cases involving "crimes under military law or for crimes committed under exceptional circumstances." (Brief p. 24 and App. A-2—A-3).

65 countries have capital punishment but excludes it for all juveniles (all persons under the age of 18 when crime committed—Brief p. 4 n.3 and A-3—A-7).

24 countries have ratified the International Covenant on Civil & Political Rights (Article 6 (5))* and/or The American Convention on Human Rights (Article 4 (5)) which prohibit imposition of capital punishment on juveniles. (A-4—A-7).

* Ireland has signed but has not ratified the Covenant and has not had an execution in at least 10 years. (A-3, A-5).

APPENDIX 6

PERSONS SENTENCED TO DEATH IN UNITED STATES,
1982-1987

Source: U.S., Department of Justice, Bureau of Justice Statistics, Bulletin, Capital Punishment, 1987, p. 10, Appendix Table 1.

Year	Persons Sentenced to Death
1982	276
1983	262
1984	295
1985	289
1986	310
1987	299
Total	1,731

APPENDIX 7

JUVENILES SENTENCED TO DEATH, 1982-1987

Sources: Streib Death Penalty for Juveniles, table 2-2, pp. 28-29; Appendix N—*Amicus Curiae* Brief of Florida Capital Collateral Representation in Case at Bar; Information Provided by Prof. Victor Streib to Counsel for Petitioner in October, 1988.

Year	Offender's Name	Age at Crime	Race	State	Current Status
1982	Barrow, Lee	17	W	TX	reversed in 1985
	Cannon, Joseph	17	W	TX	on death row
	Carter, Robert	17	B	TX	on death row
	Garrett, Johnny	17	W	TX	on death row
	Johnson, Lawrence	17	B	MD	reversed twice but resented to death in 1983 and 1984
	Lashley, Frederick	17	B	MO	on death row
	Legare, Andrew	17	W	GA	reversed in 1983; resented to death in 1984; reversed in 1986
	Stanford, Kevin	17	B	KY	on death row
	Stokes, Freddie	17	B	NC	reversed in 1982; resented to death in 1983; reversed in 1987
	Thompson, Jay	17	W	IN	reversed in 1986
1983	Trimble, James	17	W	MD	on death row
	Bey, Marko	17	B	NJ	on death row
	Cannady, Attina	16	W	MS	reversed in 1984
	Harris, Curtis	17	B	TX	on death row
	Harvey, Frederick	16	B	NV	reversed in 1984
	Hughes, Kevin	16	B	PA	on death row

APPENDIX 7

Year	Offender's Name	Age at Crime	Race	State	Current Status
	Johnson, Lawrence	17	B	MD	reversed in 1983, but resentenced to death in 1984
	Lynn, Frederick	16	B	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	B	MS	reversed in 1985
	Stokes, Freddie	17	B	NC	reversed in 1987
1984	Aulisio, Joseph	15	W	PA	reversed in 1987
	Brown, Leon	15	B	NC	reversed in 1988
	Johnson, Lawrence	17	B	MD	on death row
	Legare, Andrew	17	W	GA	reversed in 1986
	Patton, Keith	17	B	IN	reversed in 1987
	Thompson, Wayne	15	W	OK	reversed in 1988
1985	Livingston, Jesse	17	B	FL	reversed in 1988
	Morgan, James	16	W	FL	on death row
	Ward, Ronald	15	B	AR	reversed in 1987
	Williams, Raymond	17	B	PA	reversed in 1987
	Wills, Bobby	17	B	TX	on death row
1986	Comeaux, Adam	17	B	LA	reversed in 1987
	Cooper, Paula	15	B	IN	on death row
	LeCroy, Cleo	17	W	FL	on death row
	Lynn, Frederick	16	B	AL	on death row
	Sellers, Sean	16	W	OK	on death row
	Wilkins, Heath	16	W	MO	on death row
	Williams, Alexander	17	B	GA	on death row
1987	Dugar, Troy	15	B	LA	on death row
	Lamb, Wilbur	17	W	FL	on death row

APPENDIX 8

JURISDICTIONS LISTING "YOUTH"
AS A MITIGATING CIRCUMSTANCE*

1. Arkansas—Ark.Stat.Ann. 5-4-605(4) (1987).
2. Indiana—Ind. Code Ann. 35-50-2-9(c)(7) (Supp. 1988) - Age of defendant if less than 18 years of age when crime committed.
3. Kentucky—Ky.Rev.Stat. 532.025(2)(b)(8).
4. Louisiana—La. Code Crim. Pro. Art. 905.5(f).
5. Montana—Mont. Code Ann. 46-18-304 (1987) - Age of defendant if less than 18 years of age when crime committed.
6. Nevada—Nev.Rev.Stat. 200.035(6) (1986).
7. South Carolina—S.C. Code Ann. 16-3-20(6)(9) (Supp. 1987) - Age of defendant was below age of 18 when crime committed.
8. Utah—Utah Code Ann. 76-3-206.

* Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 9

**JURISDICTIONS LISTING "AGE"
AS A MITIGATING CIRCUMSTANCE***

1. Alabama—Ala. Code Ann. 13A-5-51(7) (1982).
2. Arizona—Ariz. Rev. Stat. Ann. 13-703(g)(5) (Supp. 1987).
3. Florida—Fla. Stat. Ann. 921.141(6)(g) (1985).
4. Mississippi—Miss. Code Ann. 99-19-101(6)(g) (Supp. 1988).
5. Missouri—Mo. Ann. Stat. 565.032(7) (Supp. 1988).
6. North Carolina—N.C. Gen. Stat. 15A-2000(f)(7) (1988).
7. Pennsylvania—Pa. Stat. Ann. Title 42 § 9711 (1982).
8. Virginia—Va. Code 19.2-264.4(B)(v) (1983).
9. Washington—Wash. Rev. Code Ann. Title 10 Chap. 10.95.070(7) (Supp. 1988).
10. Wyoming—Wyo. Stat. Ann. 6-2-102(j)(vii) (1988).

* Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 10

**JURISDICTIONS WHICH DO NOT SPECIFICALLY LIST
MITIGATING CIRCUMSTANCES***

1. Delaware—Del. Code Ann. Title 11 § 4209(c) (1987).
2. Georgia—Ga. Code Ann. Title 17-10-2 and Title 17-10-30(b) (1982).
3. Idaho—Idaho Code 19-2515 (1987).
4. Oklahoma—Okla. Stat. Ann. Title 21 § 701.10 (Supp. 1988).
5. South Dakota—S.D. Codified Laws Title 23A § 23A-27A-1.
6. Texas—Tex. Code of Crim. Proc. Art. 37.071(a) (Supp. 1988).

* Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 11

STATUTES SETTING FORTH STANDARDS OF PROOF FOR
TRANSFER OF JUVENILES TO ADULT COURT*

1. Georgia—Ga. Code Ann. Title 15 § 11-39(a)(3)(a-c) (Supp. 1988) - reasonable grounds to believe (a) child committed offense (b) is not committable to institution for mentally retarded or mentally ill and (c) interests of child and community require that child be placed under legal restraint and the transfer be made to appropriate court.
2. Louisiana—La. Rev.Stat. Ann. § 13.157.1(4)(a) - Probable cause to believe juvenile committed crime. - § 13.157.1(4)-(b) - No prior felony offenses - "no substantial opportunity for rehabilitation" in available juvenile facilities. - § 13.157.1(4)(b) - Prior felony conviction - "[R]easonable grounds to believe [juvenile] is not amenable to treatment or rehabilitation" in available juvenile facilities.
3. Mississippi—Miss. Code Ann. § 43-21-157(3) - (Supp. 1988) - probable cause to believe child committed crime. (4) Upon finding probable cause, youth court may transfer jurisdiction if youth court finds by clear and convincing evidence that there are no reasonable prospects of rehabilitation within juvenile justice system. § 43-21-157(5) sets forth factors to be considered by youth court in determining reasonable prospects of rehabilitation within the juvenile justice system.
4. Montana—Mont. Code Ann. § 41-5-206(1)(d) - probable cause to believe child committed crime; that it was committed "in an aggressive, violent, or premeditated manner", and that seriousness of offense and protection of community require treatment beyond that afforded by juvenile facilities.

* Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 11

5. Pennsylvania—Pa. C.S.A. Title 42 § 6355(a)(4)(i) *prima facie* case that child committed offense; (a)(4)(iii)(A) reasonable grounds to believe child not amenable to treatment as juvenile in available facilities, (B) child is not committable to institution for mentally retarded or mentally ill; and (C) interests of community require that child be placed under legal restraint or discipline or crime would carry a sentence of more than 3 years if committed by adult.

APPENDIX 12

**JUVENILE TRANSFER STATUTES REQUIRING ONLY
SHOWING OF PROBABLE CAUSE TO BELIEVE JUVENILE
COMMITTED CRIME***

1. Alabama—Ala. Code § 12-15-34(6)(f).
2. Arizona—Ariz. Rules of Procedure - Juvenile Ct. Rule 14(c).
3. Indiana—Ind. Code Ann. § 31-6-2-4(c)(2).
4. Kentucky—Ky. Rev. Stat. 208.170(2) - in effect at time of petitioner's transfer. Ky. Rev. Stat. 640.010(2)(a) - present statute as amended 4-10-88.
5. North Carolina—N.C. Gen. Stat. § 7A-608.
6. Texas—Tex. Code Ann. Family Code § 54.02(j)(5).
7. Utah—Utah Code Ann. § 78-3a-25(5); § 3 also provides that weight given to transfer factors is in court's discretion.
8. Virginia—Va. Code Ann. § 16.1-269(A)(3)(a).

*Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 13

**STATUTES WHICH DO NOT CONTAIN ANY STANDARD OF
PROOF FOR TRANSFER OF JUVENILES TO ADULT COURT***

1. Arkansas—Ark Code Ann. 9-27-324.
2. Delaware—Del. Code Ann. Title 10 § 938(c) (Supp. 1986) - Juvenile has burden of demonstrating that juvenile court should retain jurisdiction when specified felony is committed. *State v. Anderson*, Del. Super. 385 A.2d 738 (1978).
3. Florida—Fla. Stat. Ann. § 39.09(2) - court instructed to consider "The prosecutive merit of the complaint". Fla. Stat. Ann. § 39.09(2)(c)(4).
4. Idaho—Idaho Code § 16-1806(8) - Amount of weight court gives to waiver factors is discretionary. See also *Wolf v. Stcte*, 99 Idaho 476, 583 P.2d 1011 (1978). Idaho does not require "a finding of probable cause as an element of the waiver hearing." *Id.* 583 P.2d at 1014.
5. Missouri—Mo. Ann. Stat. § 211.071.
6. Nevada—Nev. Rev. Stat. § 62.080.
7. Oklahoma—Okla. Stat. Ann. Title 10 § 1112(b) - "prosecutive merit" must exist.
8. South Carolina—S.C. Code Ann. § 20-7-430.
9. South Dakota—S.D. Codified Laws § 26.11-1 and § 26-11-4. 26-11-4(4) circuit court when considering whether to retain jurisdiction over child may consider "The prosecutive merit of the complaint. The state shall not be required to establish probable cause to show prosecutive merit."
10. Washington—Wash. Rev. Code Ann. § 13.40.110.
11. Wyoming—Wyo. Stat. § 14-6-237.

*Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

9
No. 87-5765.

Supreme Court, U.S.

FILED

JAN 25 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

KEVIN N. STANFORD Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ Of Certiorari
To The Supreme Court Of Kentucky

BRIEF FOR RESPONDENT

FREDERIC J. COWAN
Attorney General

ELIZABETH ANN MYERSCOUGH
Assistant Attorney General

*DAVID A. SMITH
Assistant Attorney General
State Capitol Building
Frankfort, Kentucky 40601-3494
(502) 564-7600

**Counsel of Record*

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QUESTION PRESENTED

Does The Eighth Amendment Exempt From Capital Punishment All Murderers Who Were Under The Age Of Eighteen Years When They Committed Their Crimes?

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SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 87-5765

KEVIN N. STANFORD - - - - - *Petitioner*
v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

BRIEF FOR RESPONDENT**OPINION BELOW**

The opinion below is reported as *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781 (1987). On direct appeal of conviction, the Kentucky Supreme Court affirmed Petitioner's death sentence for capital murder and his prison sentences for first degree robbery, first degree sodomy, and receiving stolen property.

Rejecting the Petitioner's "demand[] that he has a constitutional right to treatment" as a juvenile offender, the Kentucky Supreme Court ruled that his "age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him." *Stanford, supra* at 792. The court explained that:

... Stanford has been given the benefit of treatment available to youthful offenders in the Commonwealth on a repeated basis over a period of several years before his involvement in the crimes charged in the instant case. Since the age of ten, Stanford has revolved in and out of juvenile court having committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few. *Id.*

JURISDICTION

United States Supreme Court Rules 15.1(a) and 21.1(a) in pertinent part state:

The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the question set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

The Court generally has declined to address claims presented for the first time on certiorari review, or those beyond the legitimate scope of the question for which review was granted. See, e.g., *Buchanan v. Kentucky*, ___ U.S. ___, 107 S.Ct. 2906, 2908, n.1 (1987); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Lear, Inc. v. Adkins*, 395 U.S. 653, 675 (1969); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Lawn v. United States*, 355 U.S. 339, 362, n.16 (1958). Compare: *Batson v. Kentucky*, 476 U.S. 79 (1986).

Petitioner's brief attempts to raise several constitutional claims not fairly included in the question for which certiorari was granted. The question presented in this case is whether or not all capital murderers less than eighteen years old at the time of their crimes must be automatically exempted from the death penalty on the sole basis of their birthdates.

In part "D" of his brief, however, Petitioner tries to raise the following extraneous claims that (i) as a matter of Due Process, juvenile jurisdiction waiver statutes must specifically require a reasonable doubt standard of proof, (ii) written findings by the sentencer concerning the presence or absence of mitigating circumstances are constitutionally required, (iii) written instructions to the jurors requiring them to presume the inappropriateness of capital punishment are constitutionally required, (iv) the Kentucky Supreme Court's proportionality review was "fatally

flawed" because comparison was made with the cases of juvenile and adult offenders alike, and (v) Kentucky's juvenile jurisdiction waiver statute was applied in a racially discriminatory manner.

The sole issue before this Court is whether the execution of a 17-year-old capital offender is such cruel and unusual punishment that it violates the Eighth Amendment in all cases. Because none of the foregoing claims are fairly included within the question for which certiorari was granted, Respondent respectfully submits that the Court lacks jurisdiction to consider them. In observance of the Court's procedural rules governing this matter, Respondent will confine its discussion herein to the question for which certiorari was granted.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted.

The Fourteenth Amendment to the United States Constitution in relevant part states that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

COUNTERSTATEMENT OF THE CASE

A. Petitioner's Crimes

The victim in this case, 20-year-old Barbel Poore, was an employee of the Cheker gas station on Cane Run Road in Louisville, Kentucky. (TE 399, 942, 947). She and her parents were acquainted with Petitioner, having conversed with him on several occasions. (TE

519) Petitioner lived in the apartment complex adjoining the Cheker station. (TE 407-408, 475).

Troy Johnson was a mutual friend of both Petitioner and his co-defendant, David Buchanan. (TE 1029, 1047). On January 7, 1981 Buchanan approached Johnson with a plan to rob the Cheker station. (TE 1029-1030). Johnson provided Buchanan with a handgun. (TE 1031).

Buchanan telephoned Petitioner in regard to the plan. (TE 1032-1033). The three met at Petitioner's apartment, then proceeded to the Cheker station where Johnson remained inside the car. (TE 1032-1034). As Petitioner was leaving the car to go inside the Cheker station, he expressed concern to Buchanan and Johnson that the victim might recognize him by his clothing. (*Id.*).

During the next 45 minutes, Barbel Poore was robbed, raped, orally sodomized, and anally sodomized. (TE 364-365, 373, 385-386, 398, 405, 946, 1034-1035, 1044, 1053). Once during this ordeal, Buchanan briefly returned to the car with a two-gallon can of gasoline and told Johnson to continue waiting. (*Id.*). The sexual attack took place on the restroom floor of the gas station. (TE 485). Petitioner initially raped the victim in a standing position while she held onto the sink, after which he and Buchanan took turns raping and sodomizing her on the floor. (*Id.*).

Eventually, Buchanan returned to Johnson's car a second time and instructed him to follow Petitioner, who was driving the victim in a car belonging to her mother. (TE 1035-1037). Buchanan explained to Johnson that they were going to have more sex with the victim elsewhere. (*Id.*). After both cars arrived at a secluded area on Shanks Lane in Louisville, Buchanan got out and walked over to the victim's car where Petitioner was standing. (*Id.*).

Petitioner allowed the victim to smoke a cigarette. (TE 486). Instead of having further sex with the victim, Petitioner leaned inside the victim's car and shot her in the face from point-blank range. (TE 364, 366-367, 1037). At that point Johnson got out of his car, poured the stolen gasoline into his tank, started the engine, and began backing up. (TE 1037-1038). Petitioner then fired a second shot into the back of the victim's head, causing her death. (TE 364-368, 372, 486, 1037-1038).

The victim's corpse was left kneeling in the back seat of her mother's car, naked from the waist down and with her buttocks elevated. (TE 401). A "large volume of semen" was on the left sleeve, front and back hem of her outer jacket, on her inner jacket, on her sweater, on her panties, and on the back seat of her mother's car where her head lay. (TE 401, 792-793, 796-798, 800, 805-806). Among the foreign pubic hairs on the victim's buttocks was one similar in microscopic characteristics to those belonging to Petitioner. (TE 578, 585, 602, 604, 645, 792, 794-795, 807, 811). Injuries to the victim's anus included a contusion "with radiating abrasions over the anal mucosa over the entire circumferential surface," inside of which were "large quantities of identifiable spermatozoa." (TE 363-365).

Buchanan got into the front seat of Johnson's two-door car before Petitioner got into the back seat. (TE 1040). As they were driving away from the murder scene, Petitioner smiled and asked Johnson whether he "wanted to do anything else." (TE 1041). When Johnson responded negatively, Petitioner tossed the murder weapon into the front seat. (*Id.*). Johnson dropped him off at the intersection of Shanks Lane and Cane Run Road, across the street from the Cheker station. (*Id.*).

Later that night, a neighbor named Alexis Sloan saw Petitioner carry two large boxes of cigarettes away from the Cheker station. (TE 1003, 1006-1007). Sloan agreed to "hold" them for Petitioner. (TE 1008). On the following day, Sloan and one Owen Smyzer put the cigarettes into plastic garbage bags and roamed about the neighborhood selling them. (TE 1011-1012). Afterwards, Petitioner told Sloan that the cigarettes were from the Cheker station and that he had "made a play" for them. (TE 1013-1014, 1022-1023).

While awaiting trial for capital murder, Petitioner sneaked up behind a security guard, put the end of a pencil against his ear and said, "Click, click, click, just like the girl, I'm going to blow your mother. . . brains out." (TE 1062-1063).

On another occasion, a different corrections officer heard Petitioner bragging to seven other juvenile inmates about what he had done to Barbel Poore. (TE 1076-1078). Petitioner boasted to the corrections officer about his having sodomized and raped the victim. (TE 1080). He explained the execution of the victim as follows:

I had to shoot her, the bitch lived next door to me and she would recognize me. * * * I guess we could have tied her up or something or beat the . . . out of her and told her, if she tell, we would kill her. (TE 1082).

At that moment during his conversation with the corrections officer, Petitioner "began laughing." (*Id.*).

Petitioner was convicted of capital murder, first degree sodomy, first degree robbery, and receiving stolen property. (JA 108-112). He was sentenced to death and 45 years in prison. (*Id.*).

His jointly tried co-defendant, 16-year-old David Buchanan, was convicted of murder, first degree sodomy, first degree robbery, and first degree rape. Exempted from capital punishment because he was not

the "triggerman" (JA 58-59), Buchanan was sentenced to life and 60 years in prison. *Buchanan v. Commonwealth*, Ky., 691 S.W.2d 210 (1985), affirmed, *Buchanan v. Kentucky*, ___U.S.___, 107 S.Ct. 2906 (1987).

The getaway driver, 15-year-old Troy Johnson, was tried as a juvenile and testified against Petitioner and Buchanan. (TE 1048-1050).

B. Procedural History

Petitioner was 17 years old at the time of these crimes. (JA 8). Following his arrest, Petitioner was arraigned in the Juvenile Division of the Jefferson District Court. (JA 7). There he was represented by the same public defender who had been provided to him during his initial pre-arrest interrogation by the police. (SH 14-18, 91-103; JA 7).

Ky.Rev.Stat. §208.170 provided that juvenile court jurisdiction could be waived, and the offender be tried as an adult, if he either was (i) charged with a Class A felony or capital crime, or (ii) over 16 years of age and charged with a felony.

On May 22 and July 14, 1981 the juvenile court conducted hearings to determine whether Petitioner should be transferred to the Jefferson Circuit Court for trial as an adult offender. (JA 7-8). A total of 19 witnesses testified at those hearings, which resulted in the dismissal of the rape charge but also in the transfer of Petitioner for trial as an adult offender on the remaining charges. (JA 8). Finding the Petitioner's transfer to be in the best interest of himself and of the community (JA 10), the juvenile court listed its prior but unsuccessful attempts at his rehabilitation.¹

¹ On prior occasions, Petitioner had been sent to five different treatment facilities as the result of delinquency proceedings. (JA 9). "Since the age of ten, Stanford has . . . committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few." *Stanford v. Commonwealth*, *supra*, 734 S.W.2d at 791, n.8.

Petitioner was indicted by a grand jury on November 5, 1981. (TR 81-CR-1218, 1-4).

The Jefferson Circuit (adult) Court considered and rejected Petitioner's motion² that he be tried as a juvenile. (JA 11-15, 42-44).

During the hearings on that motion, however, it came to light that the grand jury had not been informed of its option to recommend that Petitioner be tried as a juvenile in spite of the district court's prior transfer of him to the circuit court. Ky.Rev.Stat. §208.170(5)(a). (3/1/82 Hearing 179-180, 210-217; 3/8/82 Hearing 91-100). Petitioner was re-indicted accordingly. (TR 82-CR-0406, 1-4; 3/8/82 Hearing 11).

Petitioner and his co-defendant, David Buchanan, were jointly tried before a jury in August of that year. (JA 1). In accordance with the jury's verdict, Petitioner was sentenced by final judgment entered September 28, 1982. (JA 108-112).

The Kentucky Supreme Court affirmed Petitioner's conviction and sentences thereon by opinion rendered April 30, 1987. (JA 113-138). His petition for rehearing was denied on September 3, 1987. (JA 139).

This Court granted certiorari by order entered October 11, 1988. (JA 155). On October 17, 1988 the Court limited certiorari to "Question VIII presented by the petition." (JA 156).

SUMMARY OF ARGUMENT

I.

Imposition of the death penalty upon murderers less than 18 years old at the time of their crimes does not violate the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.

² Kentucky's juvenile jurisdiction waiver statute, Ky.Rev.Stat. §208.170(5)(b), conferred such discretion on the circuit court.

The Court should not depart from its longstanding premise that all capital offenders must be given individualized consideration by the sentencer. It is unrealistic to assume that all persons belonging to this age group share the same degree of immaturity. Common human experience indicates that maturity varies from individual to individual. There is no magic age at which all persons suddenly achieve the sophistication and judgment of an adult, for this is a gradual process affected by various factors. These individual differences among capital offenders of this age group should be taken into account accordingly.

Society's views are best reflected by legislative enactments. The very purpose of a legislature is to create laws consistent with the views of the majority of voters, at least in democratic societies such as the United States. Consequently, the enactments of a State legislature are the most reliable indicators available. Line-drawing is arbitrary whether it is done by the judiciary or by the legislature. The role of the judiciary is not to determine whether line-drawing on the part of the States is arbitrary, for it always will be arbitrary. Instead, the judiciary's function is to measure those lines or the absence of them against a constitutional standard. In this case the constitutional standard is defined by what American society considers cruel and unusual punishment. Unless a legislative enactment runs afoul of a clearly defined societal consensus, the Court should not draw its own line. See, Hoffman, "On The Perils of Line-Drawing: Juveniles and the Death Penalty," 40 Hastings L.J. 2 (1989).

II.

Prior to the date on which Petitioner murdered Barbel Poore, Kentucky's legislature considered and then reconsidered the idea of setting a minimum age for capital punishment. Kentucky's juvenile jurisdic-

tion waiver statute, whereby offenders under 18 years of age could be transferred to a higher court for trial as an adult, initially imposed no minimum age for capital punishment. By providing a specific age minimum (16 years) for the transfer of *non-capital* felons, however, Kentucky's legislature irrefutably demonstrated *in the same statute* that it had *considered* but rejected such a limitation with respect to capital offenders. Ky.Rev.Stat. §208.170.

In 1980, one year before the crimes at issue here, Kentucky's legislature reconsidered this matter and as a result amended that statute so as to exempt from capital punishment all persons under 18 years of age. The legislature further provided, however, that the amendment would not become effective until 1982. Thus, the Petitioner would not have benefitted from this amendment even had it become effective as originally scheduled. He committed his crimes in 1981, after the amendment was enacted but before it was to take effect. §Ky.Rev.Stat. 208F.040.

That amendment never became effective.

In 1986, the Kentucky legislature replaced its original transfer statute with a new one which set a minimum age limit of 16 years for capital punishment. Ky.Rev.Stat. §640.040. That enactment became effective in 1987.

Thus, before Petitioner committed these crimes, Kentucky's legislature demonstrated its awareness that juveniles were eligible for capital punishment. This was a conscious and considered decision by the democratically elected representatives of Kentucky.

III.

In all the States where juveniles are eligible for capital punishment, defendants of that age group enjoy additional safeguards beyond those conferred upon

chronological adults. Petitioner's case is an excellent example of this.

First, by enacting a juvenile code, Kentucky has indulged a presumption that many individuals within this age group are too immature for criminal punishment as an adult offender. At the same time, however, the enactment of a juvenile jurisdiction waiver statute is a reasonable recognition that some of these individuals have achieved adult maturity despite their chronological age. Thus, capital offenders such as Petitioner begin with a rebuttable presumption of immaturity. The government, not the accused, must prove otherwise in order to accomplish transfer of the case to a higher court for trial.

The second failsafe accorded Petitioner in this case was the statutory requirement that the grand jury be informed of its option to recommend his transfer back to the juvenile court.

Petitioner's third extra measure of protection was the adult court's statutory option to consider anew and effectively vacate the waiver of juvenile jurisdiction.

Fourth, the jury which sentenced Petitioner in this case was instructed to consider his age in mitigation of the crimes. Such special consideration of Petitioner's youthfulness by the sentencer was required by prior caselaw of this Court as well as a Kentucky statute.

Finally, the Kentucky Supreme Court is required by statute to consider the appropriateness of capital punishment in each case where the trial judge has accepted the jury's recommendation of the death penalty. The court below obviously took Petitioner's youthfulness into account when conducting this proportionality review.

ARGUMENT

The Eighth Amendment Does Not Immunize 17-Year-Old Capital Offenders From The Death Penalty On The Basis Of Chronological Age.

I.

Thompson v. Oklahoma, ___ U.S. ___, 108 S.Ct. 2687 (1988) is not dispositive of this case. Less than a majority of the Court in *Thompson* found that a national consensus of any kind exists on the issue of limiting capital punishment according to age. Although the four-Justice plurality in *Thompson* did so, neither the concurring opinion of Justice O'Connor nor the three-Justice dissent concluded that such agreement on the matter exists among the States.

The plurality, concurring, and dissenting opinions in *Thompson* all agreed, however, that evolving standards of decency on which any Eighth Amendment analysis must be based are reflected most accurately by legislative enactments:

It will rarely if ever be the case that the members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

Thompson, 108 S.Ct. at 2715 (dissent).

Thus, in confronting the question whether the youth of the defendant . . . is a sufficient reason for denying the state the power to sentence him to death, we first review relevant legislative enactments

Thompson, 108 S.Ct. at 2691 (plurality).

Both the plurality and the dissent look initially to the decisions of American legislatures for signs of a national consensus about the minimum age at which a juvenile's crimes may lead to capital punishment.

Thompson, 108 S.Ct. at 2706 (concurrence).

Those who in *Thompson* found a national consensus against the capital punishment of 15-year-old defendants will find substantially less evidence to support that conclusion where 17-year-olds are concerned. A significantly larger number of States expressly authorize capital punishment for 17-year-old offenders.

In examining this evidence, it is important to remember that Petitioner rather than Kentucky bears the burden of proof:

The deference we owe to the decisions of the state legislature under our federal system [citation omitted] is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." [citations omitted]

Gregg v. Georgia, 428 U.S. 153, 177 (1976).

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 176.

Of the 36 death penalty States,³ no more than twelve prohibit the capital punishment of 17-year-old

³ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.* (August 1, 1988) at 1.

offenders⁴. Thus, the death penalty States which permit capital punishment of this age group outnumber those which prohibit it by a ratio of at least two to one. The consensus clearly favors capital punishment of 17-year-old offenders.

More important than the presence of a consensus favoring capital punishment of juveniles is the *absence* of a consensus *opposing* it. Because the constitutional validity of an authorized punishment is presumed, Petitioner has the burden of proving that the practice enjoys virtually no acceptance among the States. *Gregg v. Georgia, supra*, 428 U.S. at 176-177. Petitioner cannot prove a consensus opposing the capital punishment of juveniles even if attention is confined to the States which have specified a minimum age for the death penalty. See footnote 4, *ante*. The death penalty States have not uniformly accepted any particular age minimum for capital punishment.

The Court should consider the number of States which have not specified in their death penalty statutes a minimum age for capital punishment, but it

⁴Appendix 4 of Petitioner's brief includes New Hampshire among a list of twelve States limiting capital punishment to persons over 18 years of age, since N.H.Rev.Stat. Ann. §630:5(XIII) (Supp. 1988) prohibits the execution of minors. N.H.Rev.Stat. Ann. §21-8:1 lists 19 as its age of majority, but §630:5(V) provides that the age limit for capital punishment is 17. Owing to this discrepancy, Petitioner's Appendix 4 lists three States having an age limit of 16, three States having an age limit of 17, and twelve States having an age limit of 18. Arguably, the list should be three, four and eleven, respectively. The dissent in *Thompson*, 108 S.Ct. at 2718, counted four States as having an age limit of 17, apparently including New Hampshire among that group. This accounts for the assertion in Kentucky's amicus brief (*Heath A. Wilkins v. Missouri*, No. 87-6026 and *Jose Martinez High v. Walter Zant, Warden*, No. 87-5666) that 25 rather than 24 of the death penalty States authorize the capital punishment of persons under 18 years of age. *Id.* at 10, n.4.

should exclude from the calculation the non-death penalty States. Neither category of States has expressly indicated a policy that capital punishment should be limited according to age. Obviously, no State which lacks a death penalty would have occasion to speak on the subject of limiting that form of punishment on the basis of age. Therefore, non-death penalty States are false indicators concerning the issue before this Court. On the other hand, it is reasonable to consider the death penalty States which do not specify a minimum age since they do subject juveniles to capital punishment. A death penalty State would have no reason to speak on the subject of age limitations unless it chose to specify a minimum. One could hardly expect the legislature to expressly state there is no minimum age for capital punishment or for any other form of criminal penalty.

Even the 14 non-capital States subject 16 and 17-year-old juvenile murderers to their most severe authorized punishment:

1). *Alaska* has no age limitation restricting waiver and transfer of individuals less than 18 years to criminal court. Alaska Stat. §47.10.060 (1984). Any person waived to stand trial as an adult is subject to the maximum punishment of imprisonment for 99 years. Alaska Stat. §12.55.125.

2). *Hawaii* permits transfer of a person 16 or 17 years old to criminal court upon waiver of jurisdiction by the family court after a hearing. Haw.Rev.Stat. §571-22. The maximum punishment carries a penalty of life imprisonment without possibility of parole subject to commutation after twenty years to life imprisonment with parole. Haw.Rev.Stat. §706-656.

3). *Iowa* allows waiver of any individual between 14 and 18 years old. A person waived from juvenile court is subject to the maximum penalty of life in

prison. 37 Iowa Code Ann. §902.1 (Supp. 1988).

4). *Kansas* permits 16 and 17-year-olds to be waived to adult criminal court. Certain categories of 16-year-olds are exempt from juvenile court jurisdiction and subject to prosecution as an adult. Kan.Stat.Ann. §§21-3611; 38-1602(b)(3)(4)(6); 38-1604(a). There is no restriction for imposing the maximum penalty of life in prison on this class of individuals. Kan.Stat.Ann. §21-4501(a) (Supp. 1988).

5). *Maine* has no age limitation in its waiver statute. Chapter 503, Title 15-3101. A sentence of life in prison is the maximum penalty which may be imposed. Chapter 51, Title 17A-1152.

6). *Massachusetts* juvenile courts have no jurisdiction over 17-year-olds. Mass.Gen.Laws Ann. Ch. 119, §21 (Supp. 1988). Fourteen, 15 and 16-year-olds may be waived to adult criminal courts. *Id.* The maximum penalty which may be imposed is life imprisonment. *Id.* Ch. 265, §2.

7). *Michigan* treats 17-year-olds as adults with juvenile courts having concurrent jurisdiction of offenders between 17 and 18 years of age and charged with certain enumerated offenses or conduct. Mich.Laws Ann. §712A.2(d) (Supp. 1988). Waiver is allowed for individuals age 15 and 16 charged with committing felonies. *Id.* 712A.4(1). The maximum penalty is life imprisonment. *Id.* 750.316.

8). *Minnesota* permits waiver of individuals aged 14, 15, 16 and 17. Waiver is mandatory in certain cases and a prima facie case of nonamenability to treatment within the juvenile court system is considered established if the individual is charged with certain enumerated offenses. Minn.Stat.Ann. §260.125(1),(3) (1989). The maximum period of incarceration is life. §609.10.

9). *New York* juvenile courts have no jurisdiction over any individual older than 16. Juvenile court jurisdiction is also excluded for individuals aged 13 or older charged with second degree murder and individuals 14 and older charged with second degree murder or other enumerated violent crimes. N.Y.Fam.Ct.Act §301.2(1)(b) (C.L.S. 1983); N.Y. Penal Law §§10(18), 30(2) (C.L.S. Supp. 1987); N.Y.Crim.Pro.Law §§180.75, 190.71, 210.43, 220.10(5)(g) (C.L.S. 1982 and Supp. 1987). The maximum penalty for a juvenile offender (under 16) is life with an indeterminate sentence of a minimum of not less than 5 years but not to exceed 9 years and a maximum of at least 3 years. N.Y. Penal Law §70.05 (C.L.S. Supp. 1988).

10). *North Dakota* allows persons 14, 15, 16 and 17 to stand trial as adults after a waiver hearing. In the case of a 14 or 15-year-old the charged offense must involve infliction or threat of serious bodily harm. Sixteen and 17-year-old may request waiver and transfer. N.D. Cont.Code §27-34(1). The maximum punishment is life without eligibility for parole for 30 years, less sentence reduction for good conduct N.D. Cont. Code §2.1-32.01.

11). *Rhode Island* permits waiver of 16 and 17-year-olds charged with indictable offenses. R.I. Gen.Laws Ann. §14-1-7. The maximum penalty for murder is life without eligibility for parole. R.I. Gen.Laws Ann. §§11-23-2, 12-19.2-1 (Cum. Supp., 1988).

12). *West Virginia* permits waiver from juvenile court of any person charged with murder regardless of age. W.Va. Code Ann. §49-5-10(c)(d). The maximum sentence is life without parole unless the jury recommends mercy. W.V. Code Ann. §62-3-15 (Supp. 1988).

13). *Wisconsin* allows persons 16 and 17 to be

waived from juvenile court jurisdiction to stand trial as adults. The maximum penalty for first degree murder is life in prison. Wisc. Stat. Ann. §§939.50(3)(a), §940.01 (Supp. 1988).

14). *Vermont* has no juvenile court jurisdiction of delinquents over 16. Vt. Stat. Ann. Title 33 §632(a)(1). Waiver is allowed for individuals 10 years of age but less than 14 for murder and other enumerated crimes. *Id.* Title 33 §635a.(a). Juvenile courts have no jurisdiction over persons 14 and 15 charged with murder or certain other crimes unless the case is transferred from criminal court to juvenile court. The maximum penalty for murder in the first degree is life imprisonment for a minimum term of 35 years; with a finding of mitigation, for a minimum of not less than 15 years; and up to and including life without parole. Title 13 §2303(a) (Cum. Supp., 1988).

As the Court can see, even though these States prohibit capital punishment, all 14 recognize that some offenders of this age group should be treated as adults in terms of culpability and accountability for crimes they commit. Once the determination is made that teenaged offenders should be tried as adults and held responsible for their violent acts, no limitation is placed on the maximum penalty which may be imposed. They are to be treated as any other adult criminal. The juvenile justice system no longer affords them protection from punishment merely because of age. The societal consensus of all 14 non-capital States is that 16 and 17-year-old murderers, by reason of age alone or the serious nature of the offense or other considerations determined by waiver hearings, should be subject to the most severe punishment authorized by their statutes. There is no consensus among these 14 States that 16 and 17-year-old murderers, once waived for trial as an adult, should not suffer maximum penal-

ties. The consensus shows the contrary, just as it does where the death penalty States are concerned.

Petitioner cannot escape the fact that even by his own account half⁵ of the States in this country subject 17-year-old capital offenders to the death penalty. This falls far short of proving a consensus against the practice, especially when the enactments of Congress are considered. Federal statutes authorize the death penalty for espionage, murder by members of the military, the destruction of aircraft or motor vehicles resulting in death, the retaliatory murder of an immediate family member of a law enforcement official, the murder of certain high ranking executive officials or of a Supreme Court Justice, killing by mail, the destruction of a train resulting in death, murder during the course of a bank robbery, treason, *et cetera*. See *Thompson, supra*, 108 S.Ct. at 2715, n.1. (dissent). Yet of all the federal crimes for which Congress has authorized the death penalty, only one is limited according to the age of the offender⁶.

From the foregoing enactments by the State and federal legislatures, it is evident that the idea of subjecting 17-year-old capital offenders to the death penalty has garnered widespread acceptance throughout this country. Certainly there is no legislative consensus against such a practice. Because these legislative pronouncements are the most reliable indicia of modern societal standards pertaining to this matter, their failure to clearly demonstrate a uniform opposition to the capital punishment of juveniles should end the inquiry now before the Court.

⁵ See footnote 4, *ante*.

⁶ Section 408 of the Controlled Substances Act of 1984, 21 U.S.C. 848, permits imposition of the death penalty for certain drug related killings. A recent amendment to that statute exempts persons under the age of 18 years from capital punishment, 134 Cong. Rec. H. 11172 (October 21, 1988); 134 Cong. Rec. S. 7580 (June 10, 1988).

The *Thompson* concurrence correctly noted *Furman v. Georgia*, 408 U.S. 238 (1972) as an example of why the evidence of a consensus against capital punishment must be clear and convincing:

In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. Indeed, counsel urged the Court to conclude "that the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced," *Furman v. Georgia*, 408 US 238, 386, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (Burger, C.J., dissenting). We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

Id. at 2709.

In his brief, Petitioner discusses various statistics other than those derived by comparing the legislative enactments of the States. He notes that the last execution of a juvenile in Kentucky took place 44 years ago. That circumstance is useless in this analysis, since the last execution of an adult in Kentucky occurred in 1962.

Petitioner suggests that his case is one of only six post-*Furman* cases in which a juvenile was tried as an adult capital offender in Kentucky. In *Thompson*

v. Oklahoma, supra, the plurality found that only about two percent of all arrests for willful homicide are committed by Thompson's age range of 0 to 16 years old.⁷ The number of arrests involving the 17 to 18 age group should also seem relatively small because the adult population may always be expected to outnumber the population of 17-year-olds.

Petitioner further points out that he is one of only two juveniles actually sentenced to death in Kentucky after *Furman* was decided. According to his own evidence, however, those two cases represent half of the opportunities for a Kentucky jury to do so during the 17 year period between 1972 and the present.

As the plurality in *Thompson v. Oklahoma* did, 108 S.Ct. at 2696, Petitioner refers to the opposition voiced by various special interest organizations. In a democratic society such as the United States only the minority would be expected to speak out in opposition. If those groups represented the majority view, they would not find it necessary to advocate that the law be changed. Consequently, this too is an unreliable factor.

Next, the Petitioner offers as evidence the laws of other countries. Much like his argument concerning non-capital States, the evidence pertaining to the laws of other countries is confounded by the fact that all but three of the 22 Western Europe and other Anglo-American nations have no death penalty at all for "ordinary crimes" (except wartime offenses or under circumstances not at issue here). See *Thompson v. Oklahoma*, 108 S.Ct. at 2696 (plurality opinion). The untrustworthiness of such cross-national comparisons is attributable to not only the substantial differences in

⁷ "The Department of Justice statistics indicate that about 98% of the arrests for willful homicide involved persons who were over 16 at the time of the offense." *Id.* at 2700.

culture and heritage, but to the very nature of crime in other countries. According to the available information, the per capita homicide rate in the United States is as much as two to 10 times higher than that of many other countries⁸. It cannot reasonably be said that this fact is insignificant in forming the attitudes of other countries with regard to capital punishment, or that the same view would be taken if these nations had a comparable homicide rate. Petitioner has not attempted to show that comparable crime rates exist in other countries. In fact, the evidence concerning juveniles is to the contrary⁹.

Finally, the Petitioner cites three international treaties as authority requiring an interpretation of the Eighth Amendment that would exempt his age group from capital punishment. Two of the treaties relied upon by Petitioner, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, have never been ratified by the United States. The third treaty, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, has been ratified but it applies only during war and even then does not prevent any country from executing its own citizens. See 6 U.S.T. 3516, 3520, 2522.

In view of all the foregoing, two things become clear when the *Thompson* plurality's criteria for a so-

⁸ Landau, "Trends In Violence And Aggression: A Cross-Cultural Analysis," 22 *Annales Internationales de Criminologie* (International Annals of Criminology) 119, 130-131 (1984); Wolfgang and Zahn, "Homicide: Behavioral Aspects," 2 *Encyclopedia of Criminal Justice* 848, 850-851 (1983).

⁹ "[I]n contrast to the pattern in the United States, the increase in crime found so prominently among the young people in Europe seems to have been concentrated among young adults between eighteen to twenty-five years of age instead of youths under eighteen." Ferdinand, "Crime Statistics: Historical Trends In Western Society," 1 *Encyclopedia Of Criminal Justice* 392, 399 (1983).

cietal consensus are examined. First, *none* of the 18 States that specify a minimum age have drawn the line below Thompson's age.

Significantly, as many as seven of those 18 States have drawn a line below Stanford's age¹⁰. Thus the evidence pertaining to this criterion, which all three *Thompson* opinions appeared to consider the most important, offers far less support for Petitioner's stance in the present case. Secondly, the other factors relied upon in *Thompson* now appear to be less reliable than was first thought. When the considerations discussed herein are analyzed in the context of a constitutional doctrine which presupposes the validity of a statute such as the one at issue, *Gregg v. Georgia, supra*, 428 U.S. at 176-177, it is reasonable to conclude that Petitioner has failed to prove his case. There is not such widespread opposition to the execution of 17-year-old capital offenders that the practice must be prohibited as a *per se* violation of the Eighth Amendment.

II.

In part F of his brief, Petitioner seeks support from the *Thompson* concurrence by arguing that Kentucky lacked a specific age minimum for capital punishment at the time these crimes were committed. Petitioner characterizes the *Thompson* concurrence as a view that all capital sentencing statutes violate the Eighth Amendment *per se* unless they specify in the same enactments a minimum age for the death penalty.

Kentucky interprets the *Thompson* concurrence differently. The concern there was not so much with statutory format as it was with the legislature's awareness that juveniles would be eligible for the death penalty:

¹⁰ See footnote 4, *ante*.

Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature *either did not realize* that its actions would have the effect of rendering 15-year-old defendants death-eligible *or did not give the question the serious consideration* that would have been reflected in the explicit choice of some minimum age for death eligibility.

Thompson, supra, 108 S.Ct. at 2710-2711 (concurring opinion, emphasis added).

In this case the evidence that Kentucky's legislature had "give[n] the question . . . serious consideration," *id.*, is irrefutable. Consequently, there was no risk whatsoever that before Petitioner committed these crimes the Kentucky legislature failed to realize the reach of its death penalty statutes.

The statute under which Petitioner was transferred to the circuit court for trial as an adult did not specify a minimum age for capital punishment. It did, however, specify a minimum age of 16 for non-capital felony convictions:

Ky. Rev. Stat. §208.170. Proceedings against children suspected of felony [Repealed effective July 15, 1984.](1) If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense,

and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

That statute remained in effect until 1987, at which time it was replaced by Ky.Rev.Stat. §§635.020 and 640.040. The first of these statutes, Ky.Rev.Stat. §635.020, in relevant part provides:

(2) If a child over fourteen (14) before the court has been charged with a capital offense, Class A felony or Class B felony, the court shall initially proceed in accordance with the provisions of KRS 640.010.

Ky.Rev.Stat. §640.040(1) specifies a minimum age of 16 for capital punishment:

No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.

It is difficult to imagine how the legislature could have failed to *consider* a minimum age for capital punishment when, in the same statute, it specified a

minimum age for non-capital offenders. Ky.Rev.Stat. §208.170(1). Further compelling evidence is found in a 1980 Act of the Kentucky legislature which, although it never took effect, clearly demonstrates that a minimum age for capital punishment had been considered prior to Petitioner's 1981 crimes. That enactment, Ky.Rev.Stat. §208F.040(1), would have exempted 18-year-olds from capital punishment:

No youthful offender who has been convicted of a capital offense shall be sentenced to capital punishment, but instead shall be sentenced to a term appropriate for one who has committed a Class A felony.

Even those death penalty States which do not specify a minimum age for capital punishment deserve a presumption that one legislative hand knows what the other has done. Some of the State legislatures, for example, have arranged their penal codes so that crimes are defined in one volume or chapter while the various penalties therefor and defenses thereto are provided in another. Such an organizational arrangement would not perforce invalidate an entire penal code or any part of it¹¹.

It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . we are especially justified in presuming both that those representatives were aware of the prior interpretation . . . and that their interpretation reflects their intent

¹¹ "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Tennessee v. Garner*, 471 U.S. 1, 28 (1984) (O'Connor, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).

Cannon v. University of Chicago, 441 U.S. 677, 696, 698 (1979)¹².

¹² See also, e.g., *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 319 (1983); *Shapiro v. United States*, 35 U.S. 1, 16 (1947); *Lewis v. United States*, 445 U.S. 55, 61-64 (1980); *Roche Products v. Bolar Pharmaceutical Co.*, 733 F.2d 858 (D.C. Cir. 1984); *Florida Nat. Guard v. Federal Labor Rel. Authority*, 699 F.2d 1082 (11th Cir. 1983); *Martin v. Luther*, 689 F.2d 109 (7th Cir. 1982); *United States v. Professional Air Traffic Controllers*, 653 F.2d 1134 (7th Cir. 1981); *Air Transport, Etc. v. Profess. Air Traffic, Etc.*, 667 F.2d 316 (2nd Cir. 1981); *Anderson Seafoods, Inc. v. Graham*, 529 F.Supp. 512 (N.D. Fla. 1982); *Anderson v. Black & Decker*, 597 F.Supp. 1298 (E.D. Ky. 1984); *Daou v. Harris*, 139 Ariz. 353, 678 P.2d 934 (1984); *In re Misener*, 213 Cal.Rptr. 569, 38 C.3d 543, 698 P.2d 637 (1985); *Ingram v. Cooper*, Colo., 698 P.2d 1314 (1985); *State v. Dupree*, 196 Conn. 655, 495 A.2d 691 (1985); *Giuricich v. Emtrol Corp.*, Del., 449 A.2d 232 (1982); *State v. Dunmann*, Fla., 427 So.2d 166 (1983); *Leonard v. Benjamin*, 253 Ga. 718, 324 S.E.2d 185 (1985); *Marsland v. Pang*, 5 Hawaii App. 463, 701 P.2d 175 (1985); *People v. Palmer*, 84 Ill.Dec. 658, 104 Ill.2d 340, 472 N.E.2d 795 (1984); *Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, Ky., 690 S.W.2d 393 (1985); *Bunch v. Town of St. Francisville*, La.App., 446 So.2d 1357 (1984); *Mayor and City Council of Baltimore v. Hackley*, 300 Md. 277, 477 A.2d 1174 (1984); *People v. Smith*, Mich., 378 N.W.2d 384 (1985); *Kilowatt Organization (TKO), Inc. v. Dept. of Energy, Planning and Development*, Minn., 336 N.W.2d 529 (1983); *Holt v. Burlington Northern R. Co.*, Mo.App., 685 S.W.2d 851 (1984); *Thiel v. Taurus Drilling Ltd.*, Mont., 710 P.2d 33 (1985); *Douglas County v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982); *Boulder City v. General Sales Drivers, Etc.*, 101 Nev. 117, 694 P.2d 498 (1985); *Mahwah Tp. v. Bergen County Bd. of Taxation*, 98 N.J. 268, 486 A.2d 818 (1985); *Garrison v. Safeway Stores*, 102 N.M. 179, 692 P.2d 1328 (1984); *Arbegast v. Board of Ed. of South New Berlin Cent. School*, 490 N.Y.S.2d 751, 65 N.Y.2d 161, 480 N.E.2d 365 (1985); *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984); *State v. Clark*, N.D., 367 N.W.2d 168 (1985); *Commonwealth v. Milano*, 300 Pa. Super. 251, 446 A.2d 325 (1982); *State v. Feioh*, S.D., 364 N.W.2d 536 (1985); *Brown-Forman Distillers Corp. v. Olsen*, Tenn.App., 676 S.W.2d 567 (1984); *Driscoll v. Harris County Com'rs. Court*, Tex.App., 688 S.W.2d 569 (1985); *Murray City v. Hall*, Utah, 663 P.2d 1314 (1983); *State v. Peterson*, 100 Wash.2d 788, 674 P.2d 1251 (1984); *Pullano v. City of Bluefield*, W.Va., 342 S.E.2d 164 (1986); *In Interest of P.*, 119 Wisc.2d 349, 349 N.W.2d 743 (1984); *Capwell v. State*, Wyo., 686 P.2d 1148 (1984).

Carried to its logical conclusion, Petitioner's interpretation of the *Thompson* concurrence would exempt juvenile murderers from *non-capital* punishments as well as from the death penalty. According to Petitioner's approach, a teenaged killer could not even be sentenced to life in prison unless the homicide statute itself specified a minimum age. Such an approach is neither reasonable nor required by the Eighth Amendment.

It would be unrealistic to conclude from statutory format alone that a State has failed to appreciate or seriously consider the scope of its death penalty law. All 36 of the death penalty States have either passed or amended in some manner their juvenile waiver statutes *after* they enacted their post-*Furman* capital punishment statutes.¹³

¹³ Ala.Code §12-15-34(a)(Repl.1986); Ariz.Rev.Stat. Ann. §8-202 (1974 and Supp. 1984); Ariz. R.P. Juv.Ct. 12, 14; Ark. Code Ann. §§5-1-116(b), 5-10-101 (1987); Cal.Pen.Code §190.5 (1988); Col.Rev.Stat. §16-11-103 (1)(a)(Repl.1986); Conn. Gen.Stat. Ann. §53a-46a(g)(1) (1987); 10 Del.Code Ann. §938(a)(1)(1975), 11 Del.Code Ann. §§636, 4209 (Repl. 1987); Ga. Code Ann. §15-11-5, §17-9-3 (1982); Fla.Stat. Ann. §39.02(5)(c)(1)(Supp. 1988); Idaho Code §16-1806 (l)(a)(Supp. 1988); 38 Ill. Ann. Stat. §9-1(b)(Supp. 1988); Ind. Code Ann. §35-50-2-3(b)(Supp. 1988); Ky. Rev. Stat. §640.040(l)(Supp. 1987); La. Rev. Stat. Ann. §§14.30, 13:1570(A)-(5)(1986); 27 Md. Code §412(f)(Repl. 1988); Miss. Code Ann. §43-21-151(3)(Supp. 1987); Mo. Rev. Stat. §211.071.1 (1988); Mont. Code Ann. §§41-5-206(1)(a)(i), 45-5-102 (1987); Nebr. Rev. Stat. §28-105.01 (1985); Nev. Rev. Stat. §176.025 (1987); N.H. Rev. Stat. Ann. §§21-B:1, 630.1 (V), 630.5 (XIII)(1986, Supp. 1987); N.J. Stat. Ann. §§2A:4A-22(a), 2C:11-3(g)(Repl. 1987, Supp. 1988); N.M. Stat. Ann. §§28-6-1(A), 31-18-14(A), 32-1-29(Repl. 1987); N.C. Gen. Stat. §§7A-608, 13-17 (Supp. 1987); Ohio Rev. Code Ann. §2929.02(A)(1986); 10 Okla. Stat. Ann. §§1104.2(A), 1112(b)-(1987); 21 Okla. Stat. Ann. §701.9 (Supp. 1989); Ore. Rev. Stat. §§161.620, 419.476(1)(1987); 42 Pa. Cons. Stat. Ann. §6322(a)(1978) & §6355(a)(1), (e)(1982); S.C. Code Ann. §20-7-430(4)(6)(1988); S.D. Cod. L. Ann. §§26-8-7, 26-11-4 (1988); Tenn. Code Ann. §§37-1-102(3), 37-1-134(a)(1); Tex. Pen. Code Ann. §8.07(d)(Supp. 1989); Utah Code Ann. §78-3(a)(25)(l)(Supp. 1988); Va. Code Ann. §16.1-269(A), §18.2-31(Supp. 1988); Wash. Rev. Code §§9A.32.030(2), 10.95.020, 13.40.110 (1)(a) (1988, Supp. 1988); Wyo. Stat. Ann. §6-2-101, §14-6-23 (1986).

It is a necessary rule of statutory construction to assume that one legislative hand knows what the other has done, and this is an especially safe assumption given the relative timing of the enactments and revisions at issue here. In view of the foregoing, Petitioner's assertion that any State has unwittingly exposed youthful murderers to capital punishment is less than credible.

III.

State legislatures set the maximum age for juvenile jurisdiction as high as they do to benefit every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By reaching beyond the common denominator of chronological immaturity, the States are justified in examining each juvenile individually to determine whether an exception should be made in his or her particular case. As the Court has emphasized on prior occasions, maturity and sophistication are factors which vary from individual to individual, so chronological age is only one of the various circumstances that should be taken into account.

Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully "street-wise," hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in *In re Gault*, 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have.

Fare v. Michael C., 442 U.S. 707, 734, n.4 (1979) (Powell, J., dissenting).

In urging the Court to discover in the Eighth Amendment a minimum age for capital punishment, Petitioner contends that 17-year-olds are invariably too immature for such punishment. His position on the matter runs afoul of a long line of decisions by this Court. During the 17 years since *Furman v. Georgia*, *supra* was decided, the theme of this Court's death penalty opinions has been that the appropriateness of such a punishment must be determined on an individualized basis.

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.' *California v. Brown*, 479 U.S. 538 (1987) (O'Connor, J., concurring)." *Thompson* at 2698.

Guided, individualized consideration of the offender's character and the circumstances of his crime is the touchstone of capital sentencing. See *Zant v. Stephens*, 462 U.S. 862, 879 (1983), collecting cases. *Gregg v. Georgia*, 428 U.S. 153 (1976) and its progeny are intended to avoid the kind of "rigid", "mechanical" and "wholly arbitrary" determination urged here by Petitioner. *Barclay v. Florida*, 463 U.S. 939, 950 (1983). No particular circumstance of a capital offender's crime should automatically require the death penalty, *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325 (1976), or automatically foreclose it, *Tison v. Arizona*, 483 U.S. ___, 107 S.Ct. 1676 (1987). Rather, the sentencer must be "free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983). Youthfulness is only one such factor and it is not necessarily the most important.

Maturity varies from individual to individual. Some individuals never attain it; some do at an age labeled "child." "Some of the older minors become fully

'street-wise,' hardened criminals, deserving no greater consideration than that properly afforded all persons suspected of crime." *Fare v. Michael C.*, *supra*, 442 U.S. at 734, n.4.

The need for individual consideration of the defendant's character and the circumstances of his crime becomes glaringly apparent now that a question of Jose Martinez High's true age has been raised¹⁴. Has High suddenly become more deserving of the death penalty as a 19-year-old murderer, or less deserving of death penalty as a 17-year-old murderer? Neither the circumstances of the crime nor the defendant's character at the time he committed the crime have changed. There is no reason relating to the crime or the defendant which should preclude the death penalty for High. To draw a bright-line rule prohibiting execution of anyone less than 18 years of age, and thus prohibiting High's execution if Georgia cannot establish his age at 19, undermines the very purpose of individualized sentencing of offenders, which is to fashion a sentence appropriate to the crime.

Juveniles who are tried as adults receive the benefit of individualized consideration twice, before their transfer from the juvenile court and again when they are tried as an adult.

No national policy of automatic exemption for 17-year-olds from the death penalty exists. For those 17-year-olds subject to juvenile court jurisdiction, waiver proceedings provide individual consideration of whether the offender can best be served by the juvenile or criminal justice system. *Kent v. United States*, 383 U.S. 541 (1966) requires a hearing, assistance of counsel and a statement of reasons for the transfer.

¹⁴ After the State of Georgia filed a suggestion of mootness by reason of newly discovered evidence concerning High's birthdate, the Court substituted the present case in place of his. (JA 156).

These minimum Due Process rights provide additional safeguards that offenders with presumptive juvenile status will not be arbitrarily reclassified as adults.

In all States where juveniles are eligible for the death penalty, their youth must be presented as a mitigating factor to the sentencer. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Twenty-nine States¹⁵ have adopted the holding of *Eddings* through legislation designating the defendant's age as a mitigating factor in capital cases.

In every trial where death is a possible penalty, a 16 or 17-year-old will be accorded consideration of his youth in the assessment of punishment. Age alone should not exclude a punishment otherwise deemed appropriate considering the defendant's character and criminal act.

Petitioner's case is illustrative of the extent to which juveniles charged with capital crimes are given procedural safeguards beyond those conferred upon adult offenders.

¹⁵ Ala. Code §13A-5-51(7) (Repl. 1982); Ariz. Rev. Stat. Ann. §13-703(G)(5)(Supp. 1988); Ark. Code Ann. §5-4-605(4)(1987); Cal. Penal Code §190.05(h)(9)(West 1988); Col. Rev. Stat. §16-11-103(5)(a)(Repl. 1986); Conn. Gen. Stat. Ann. §53a-46(a)(g)(1)(1987); Fla. Stat. Ann. §921.141(6)(g)(1985); Ind. Code Ann. §35-50-2-9(c)(7) (Cum. Supp. 1988); Ky. Rev. Stat. Ann. §532.025(2)(b)(8)(Cum. Supp. 1988); La. Code Crim. Proc., art. 905.5(f)(1984); 27 Md. Code §413(g)(5)(Repl. 1988); Miss. Code Ann. §99-19-101(6)(g)(Cum. Supp. 1987); Mo. Rev. Stat. §565.032.3 (7)(1988); Mont. Code Ann. §46-18-304(7)(1987); Nebr. Rev. Stat. §29-2523(2)(d)(1985); Nev. Rev. Stat. §200.035(6)(1987); N.H. Rev. Stat. Ann. §630.5(II)(b)(5)(1986); N.J. Stat. Ann. §2C:11-3 (c)(5)(c)(Supp. 1988); N.M. Stat. Ann. §31-20A-6 (i)(Repl. 1987); N.C. Gen. Stat. §15A-2000(f)(7)(Supp. 1987); Ohio Rev. Code Ann. §2929.04(8)(4)(1986); Ore. Rev. Stat. §163.150(1)(b)(8)(Supp. 1988); 42 Pa. Cons. Stat. Ann. §9711(e)(4)(Supp. 1987); S.C. Code Ann. §16-3-20(C)(b)(7)(9) (Supp. 1987); Tenn. Code Ann. §39-2-203(j)(7)(Cum. Supp. 1988); Utah Code Ann. §76-3-207(2)(e)(Supp. 1988); Va. Code Ann. §19.2-264.4(8)(v)(Supp. 1988); Wash. Rev. Code §10.95.070(7) (Cum. Supp. 1988); Wyo. Stat. Ann. §6-2-102(j)(vii)(1988).

First, the statute under which juvenile court jurisdiction was waived set out various criteria for determining whether Petitioner should be held accountable as an adult and transferred to the circuit court accordingly. Ky. Rev. Stat. §208.170 stated:

(1) If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

(3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the

use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

(5) When the juvenile session of district court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile session of district court. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile session of district court.

(b) If an indictment is returned, the court may in its discretion order the case transferred to the juvenile session of district court.

(c) If an indictment is returned and the court does not transfer the case to juvenile session of district court, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult. (Enact. Acts 1952, ch. 161, §17; 1954, ch. 193, §4; 1956, ch. 157, §26; 1962, ch. 212, §4; 1974, ch. 406, §308; 1976, ch. 168, §6; 1980, ch. 188, §164, effective July 15, 1980.)

As previously detailed in the "Procedural History" segment of this brief, Petitioner had a long and continuous juvenile record of criminal offenses. His prior record included arson, burglary, sexual abuse, theft and assault, "to name but a few." *Stanford v. Commonwealth, supra*, 734 S.W.2d at 792. In addition, the

juvenile court judge noted that on prior occasions, Petitioner had been sent to five different treatment facilities. (JA 9). The juvenile court conducted separate hearings to determine probable cause for Petitioner's arrest and to consider whether he should be transferred to the circuit court for trial as an adult. (JA 7-8). As a result of those proceedings, the juvenile court made specific written findings. (JA 10).

Second, the Petitioner was indicted by a grand jury not once but twice since in the first instance, the grand jury had not been informed of its option to recommend his transfer back to the juvenile court. Ky.Rev.Stat. §208.170(5)(a); (3/1/82 Hearing 179-180, 210-217; 3/8/82 Hearing 91-100).

The statute also gave the circuit court the option of considering this matter anew and returning Petitioner back to the district court for trial as a juvenile. Ky.Rev.Stat. §208.170(5)(b); (JA 11-15, 42-44).

At trial, Petitioner's jury was instructed to consider his youthfulness in mitigation of these crimes. (JA 99-100).

Finally, the Kentucky Supreme Court obviously took Petitioner's youthfulness into account when conducting its proportionality review of the death sentence. *Stanford v. Commonwealth, supra*, 734 S.W.2d at 792-793.

In view of all the careful consideration given to Petitioner, this Court should hold that his sentence of death does not violate the Eighth Amendment.

CONCLUSION

WHEREFORE, the opinion below should be affirmed.

Respectfully submitted,

FREDERIC J. COWAN

Attorney General

ELIZABETH ANN MYERSCOUGH

Assistant Attorney General

*DAVID A. SMITH

Assistant Attorney General

State Capitol Building

Frankfort, Kentucky 40601-3494

Counsel for Respondent

**Counsel of Record*

No. 87-5765

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIO, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

KEVIN N. STANFORD,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Kentucky

REPLY BRIEF FOR PETITIONER

J. DAVID NIEHAUS
Deputy Appellate Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District
Public Defender
Of Counsel

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800
Counsel for Petitioner
**Counsel of Record*

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PREFACE

The purpose of this brief is to demonstrate that the manner in which the respondent has concluded that there is a consensus in this country which favors capital punishment of juveniles is misleading and is not supported by a reasonable examination of available data.

Similarly, this brief will refute the respondent's position that setting a minimum age of 18 for the imposition of capital punishment is impermissibly arbitrary. The respondent's position not only ignores the fact that age barriers are routinely erected by society because of the fundamental differences between juveniles and adults, but also fails to consider valid, objective criteria by which "evolving standards of decency" are determined. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Kentucky did not prescribe a minimum age for the imposition of capital punishment at the time of the offense for which the petitioner was convicted. Consequently, this brief will also address the respondent's attempt to escape the impact of *Thompson v. Oklahoma*, ____ U.S. ____, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

Lastly, this brief will refute the respondent's assertion that Part D of the petitioner's original brief sets forth arguments which are not fairly encompassed by the question presented. The respondent's brief argues that because certain procedural safeguards exist in capital cases, the imposition of capital punishment on a juvenile who is under the age of 18 at the time of the crime does not violate the Eighth and Fourteenth Amendments. In Part D of his brief, the petitioner demonstrates that the safeguards against arbitrary imposition of the death penalty on a juvenile are, in practice, hollow and meaningless. Therefore, the points made in Part D of the petitioner's brief are fairly presented to the Court because they refute the respondent's argument concerning the existence of adequate due process safeguards in capital cases.

Before commencing his arguments, the petitioner finds it necessary to respond to the respondent's distortion of certain factual matters and its use of the statement of a non-testifying

co-defendant, David Buchanan, as evidence of the petitioner's guilt.

At the outset it should be noted that only Buchanan was convicted of rape. (TE IX, 1347). Indeed, the indictments did not even charge the petitioner with rape and the instructions allowed the petitioner to be convicted of only one count of sodomy. (TR 81CR1218, Vol. I, 1-3; TR 82CR0406, Vol. I, 1-3; Vol. II, 234, 237, 245).

Contrary to the respondent's version of the facts, Buchanan never told Troy Johnson that he and the petitioner had sex with the victim. On direct examination, Johnson was asked the following questions and gave the following answers. (TE VII, 1036-1037):

Q. 3073 [D]id [Buchanan] tell you what happened while he was over at the Checker Station?

A. Said that he had had sex with her . . .

Q. 3076 Did . . . Buchanan tell you why you were going to the car?

A. To have some more sex with her.

It should also be noted that the prosecution's expert testified that hair comparisons do not constitute a basis for a positive, personal identification. (TE VI, 804-812, 826).

It is axiomatic that the statement of a non-testifying co-defendant does not constitute evidence of another defendant's guilt. *Bruton v. United States*, 391 U.S. 123, 125 (1968). Indeed, Buchanan's statement is presumptively unreliable. *Lee v. Illinois*, 476 U.S. 530, 539 (1986). Nevertheless, the respondent's brief (pp. 4-5) relies on it as evidence to prove what the petitioner was supposed to have done in the bathroom of the service station.

The "bragging" and "boasting" (Respondent's Brief, p. 6) about the crime could have been just that, an attempt to impress the petitioner's peers and nothing more. Indeed, boasting in front of peers is perhaps the epitome of juvenile behavior and there are any number of reasons unrelated to the

question of guilt why a juvenile might admit to criminal conduct. See e.g. *Crane v. Kentucky*, 476 U.S. 683 (1986).

The prosecution's case was based largely on the self-serving statements of two co-defendants, but there is objective and independent evidence that casts substantial doubt on the credibility of Johnson's testimony and Buchanan's statement.

Two women drove upon the crime scene at the moment the shots were fired. Two black men walked past their car and a third man was in a nearby car. Neither of the women identified the petitioner as being either of the men who walked past their car. (TE IX, 954-972, 983-992). The women identified David Buchanan's uncle, Calvin, as being one of the men that passed their car. (TE IV, 536; TE IX, 972, 991).

Johnson testified that the petitioner was supposed to have fired the shots from the driver's side of the victim's car but the position of the victim's body and the location of the gunshot wounds were inconsistent with the testimony that the shots were fired from the driver's side of the car. The victim was found face down in the rear seat of her car. Her head was on the driver's side of the car. (TE III, 400-401; TE IV, 576-579). She sustained a non-fatal gunshot wound to the left side of the mouth and also sustained a lethal wound to the right side of the head. (TE III, 366-368, 372). This evidence supports the conclusion that the first shot fired had to have resulted in the non-fatal wound to the left side of the face. That shot would have caused her head and body to spin to the right and back of the car and be pushed toward the driver's side of the car. Since only one gun was alleged to have been involved and one individual was alleged to have fired the shots, the position of the body indicates that the fatal shot could not have been fired from the driver's side of the car where the petitioner was supposed to have been standing.

Footprints were found in the snow on the driver's and passenger's sides of the victim's car. (TE IV, 580-584; See also photographs Commonwealth's Exhibits 47-1-9 and 48-1-19). Moreover, scientific testing disclosed a positive reaction for firearms residue around the dome light in the center of the

victim's car. (TE VI, 760-761, 770-771). When considered with the position of the victim's body, the evidence is more consistent with the gunshots having been fired by someone leaning in the passenger side of the car.

The evidence, taken as a whole, substantially undercuts the credibility and reliability of Joanson's testimony and Buchanan's statement.

ARGUMENT

I. Determining Consensus On Imposition Of Capital Punishment On Juveniles.

Of the 36 states which permit capital punishment, 12 preclude the imposition of the death penalty on a juvenile who was 17 at the time of the crime.¹ From this data, the respondent concludes that there is a national consensus which favors the death penalty for juvenile offenders. (Respondent's Brief, pp. 13-15). This conclusion is totally misleading for several reasons and even if it was true, it would not necessarily establish the constitutionality of capital punishment for juveniles because "no penalty is *per se* constitutional." *Solem v. Helm*, 463 U.S. 277, 290 (1983).

¹ The respondent suggests in n. 4 of its brief (p. 14) that New Hampshire should not be included among the 12 states which limit capital punishment to persons over the age of 18. New Hampshire law provides, "In no event shall any person under the age of 17 years be culpable of a capital murder." N.H. Rev. Stats. Ann. § 630:1 (1986 Repl., p. 38) *Capital Murder*—§ V. "In no event shall a sentence of death be carried out upon a pregnant woman or a person for an offense committed while a minor." § 630:5 N.H. Rev. Stats. Ann. Procedure in Capital Murder—§ XIII (1988 Cum. Supp., p. 10). The age of majority is 18. N.H. Rev. Stats. Ann. §§ 21-B:1 and 21:44 (1987 Cum. Supp.). A plain reading of the New Hampshire statutes indicates that while a 17 year old may be convicted of a capital murder, he or she cannot be subjected to the death penalty. Therefore, New Hampshire is properly included among the 12 death penalty states which prohibit the execution of juveniles. (See Petitioner's Brief, App. 4).

The respondent's analysis ignores the 14 states and the District of Columbia which prohibit capital punishment. Surely, a national consensus cannot be determined by disregarding those jurisdictions. It is simply illogical to conclude, as does the respondent, that such jurisdictions are "false indicators" in determining a consensus on the issue of the execution of defendants who are juveniles at the time of their crimes.

As data supporting its conclusion, the respondent has inappropriately included 18 states which do not expressly establish a minimum age in their capital punishment statutes. (Respondent's Brief, p. 13, n. 3).² However, the plurality and concurring opinions in *Thompson* do not take those states into account in determining whether there is a consensus in favor of the death penalty for juveniles because "they do not focus on the question of where the chronological age line should be drawn"³ and because it is by no means certain that those states have "deliberately chosen"⁴ to permit capital punishment for juveniles who were 17 years old at the time of committing a crime.

Thus, when these 18 states are added to the 12 states which prohibit the death penalty for a juvenile who was 17 at the time of the crime, only six of the 36 death penalty states have specifically authorized the death penalty for juveniles. (See Petitioner's Brief, App. 4 at p. 22a). The laws of six states hardly establish a national consensus.

The respondent's search for a national consensus cannot be advanced by its argument that age alone should not be a factor in treating juveniles differently from adults for punishment purposes because juveniles who are convicted of serious crimes in non-death penalty jurisdictions must face the same punish-

² The 18 jurisdictions are listed in the plurality opinion in *Thompson*, 106 S.Ct. at 2695, n. 26. Although 19 jurisdictions are listed in n. 26, Vermont can be deleted therefrom because it now prohibits capital punishment. See Title 13, Vt. Stat. Ann. § 2303 (Supp. 1988).

³ *Thompson v. Oklahoma*, 106 S.Ct. at 2695 (plurality opinion).

⁴ *Id.* 106 S.Ct. at 2707 (O'Connor, J., concurring).

ment as adult offenders. This argument ignores the principle that "the penalty of death is qualitatively different" from any other sentence. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The issue here is not whether juveniles who are convicted of murder should escape punishment, as the respondent's analysis seems to imply, but whether the Eighth and Fourteenth Amendments preclude the imposition of capital punishment on an accused who is under the age of 18 at the time of committing a crime. In light of the difference between the death penalty and other sentences, it is inappropriate for the respondent to analyze the constitutionality of the death penalty for juveniles by relying on the fact that non-death penalty states subject juveniles to the same punishment as adult offenders.

The respondent asserts not only that "there is no legislative consensus against" subjecting 17 year old juveniles to the death penalty, but also that state statutes concerning capital punishment "are the most reliable indicia of modern societal standards pertaining to" the issue before the Court. (Respondent's Brief, p. 19). The respondent presumes that the petitioner can prevail only if he shows, at the very least, that a substantial majority of jurisdictions preclude the imposition of the death penalty on a juvenile who was 17 at the time of the crime. However, neither unanimity nor a "compelling" majority of the laws of the states is constitutionally required to establish a consensus. *Enmund v. Florida*, 458 U.S. 782, 793 (1982). Since the respondent can establish that only six states specifically authorize the death penalty for juvenile offenders, the consensus on the issue of a death penalty for juvenile offenders undoubtedly favors the petitioner's position.

Since the respondent considers legislative enactments to be the most important factor in determining the issue presented by this case it has summarily dismissed other criteria necessary to resolve Eighth Amendment issues. In determining whether a particular punishment violates the Eighth Amendment, the Court's "judgment 'should be informed by objective factors to the maximum possible extent.'" *Enmund*, 458 U.S. at 788 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977))

(plurality opinion). Such factors include "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made . . .". *Enmund*, 458 U.S. at 788. The respondent argues that with the exception of legislation, the criteria used by the *Thompson* plurality in resolving that Eighth Amendment issue are invalid or unreliable. Such a notion was squarely rejected by *Enmund*, 458 U.S. at 788.

Expressing what can only be described as a distorted view of what truly constitutes a democratic society, the respondent concludes that minority views are too much of an "unreliable factor" upon which to base a decision abolishing capital punishment for juveniles because "only the minority would be expected to speak out in opposition" and "[i]f those groups represented the majority view, they would not find it necessary to advocate that the law be changed." (Respondent's Brief, p. 21). A democratic society, as envisioned by the respondent, would undoubtedly suppress the expression of any views contrary to the perceived majority opinion and thereby render the rights of minorities to be purely fictional. For true democracy to flourish, the legal system must vigilantly protect minority rights. See e.g. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The respondent's argument is particularly surprising in light of the fact that a majority of the jurisdictions in this country prohibit the imposition of capital punishment on a juvenile who was under the age of 18 at the time of the crime.

Equally incredible is the respondent's argument that expression of the international community's overwhelming opposition to the imposition of the death penalty on juveniles can be ignored by the Court in its Eighth Amendment analysis. The respondent reasons, "The untrustworthiness of such cross-national comparison is attributable not only to the substantial differences in culture and heritage, but to the very nature of crime in other countries." (Respondent's Brief, pp. 21-22). In defense of its position, the respondent asserts that the homicide rate in the United States is considerably higher than that of many other countries. (Respondent's Brief, p. 22). Aside

from the fact that the killing of a human being is no different whether it occurs in a foreign country or this country, the respondent's argument completely undercuts and invalidates the deterrence rationale for a juvenile death penalty because its existence in this country has not resulted in a decrease in the homicide rate and its absence in other countries has not contributed to an increase in their homicide rates. ⁴⁸

The respondent's rejection of international opinion on the basis of differences in culture and heritage is disturbing in light of the fact that this country began as and continues to be the world's melting pot. Our country is an amalgam of the heritage, cultures, and beliefs brought by the immigrant peoples who settled here. The prohibition against executing juvenile offenders is a bond uniting numerous countries that have little else in common. (See Appendix, A-1—A-7 of *Amicus Curiae* Brief filed by Amnesty International). The substantial diversity among the cultures, political systems, and economic status of the numerous countries that have outlawed capital punishment for juveniles is precisely the reason why it is a reliable factor in determining evolving standards of decency.

II. Prohibiting Capital Punishment For Juveniles Under The Age Of 18 At The Time Of Committing A Crime.

The thrust of the arguments in Section III of the respondent's brief is that juveniles as a class should not be exempted from capital punishment. The respondent argues that the determination of whether a juvenile should be sentenced to death should be made by considering the accused's background, character and the circumstances of the crime. The respondent adopts this approach because of its view that adequate procedural and substantive safeguards exist which prevent arbitrary imposition of the death penalty. The premises upon which the respondent bases these arguments are substantially flawed.

The respondent urges the Court to reject a "bright line" approach to the resolution of the issue of whether juveniles should be subjected to capital punishment. "The Court should not depart from its longstanding premise that all capital offend-

ers must be given individualized consideration by the sentencer. It is unrealistic to assume that all persons belonging to this age group [juveniles less than 18 years old at the time of their crimes] share the same degree of immaturity." (Respondent's Brief, p. 9). That argument, embodied in Section III of the respondent's brief, ignores not only society's presumption that persons under the age of 18 are immature and do not act as adults and cannot be expected to do so, but also the special treatment society affords juveniles as a class.

As to virtually every aspect of a juvenile's life, society has erected age barriers which are predicated on the presumption of a juvenile's immaturity and irresponsibility. Laws which are enacted by society and which restrict the rights and privileges of juveniles on the basis of age are absolute. They are the embodiment of the well-recognized and readily accepted differences between adults and juveniles.

The respondent is apparently content with such an approach in all aspects of a juvenile's life with the exception of the imposition of capital punishment. By way of example, the right to vote at both the state and federal levels is not determined by an individual's maturity or other personal characteristics. It is determined solely by one's age. All persons under the age of 18 are treated alike and no distinction is made on the basis of socioeconomic or cultural factors or social and intellectual development. The respondent offers no persuasive reasons why all other aspects of a juvenile's life can be governed solely by age and why the issue of whether society should execute a juvenile should be based on individualized consideration in a given case. The bright-line approach taken by society on virtually every other important aspect of a juvenile's life should likewise be utilized in exempting juveniles under the age of 18 from the imposition of capital punishment.

III. Impact Of *Thompson v. Oklahoma*

The respondent concedes that the statute under which the petitioner was transferred to the circuit court for trial as an adult (KRS 208.170) did not specify a minimum age for capital punishment. (Respondent's Brief, p. 24). However, the

respondent concludes that the Kentucky legislature must have considered a minimum age for capital punishment because the transfer statute [KRS 208.170(1)] permitted a juvenile who was under the age of 16 to be transferred to circuit court for trial as an adult if reasonable cause was found to believe that the child had committed a Class A Felony or a capital offense. The respondent finds this legislative consideration in the plain language of KRS 208.170. (Respondent's Brief, pp. 25-26). What the respondent ignores is that the plain language of the statute undoubtedly permits a 10 or 12 year old juvenile to face the death penalty. In light of *Thompson v. Oklahoma*, it is difficult to believe that such "consideration" by a state legislature would enable the statute to pass constitutional muster under the Eighth and Fourteenth Amendments.

Simply because the Kentucky legislature clarified its position on a minimum age for capital punishment by enacting KRS 640.040 in 1987, it does not follow, as the respondent suggests, that *any* consideration was given to setting a minimum age for the imposition of capital punishment in 1981 pursuant to KRS 208.170 which was in effect at the time of the crime for which the petitioner was convicted. "In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *United States v. James*, 478 U.S. 597, 606 (1986) quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430 (1981) quoting *TVA v. Hill*, 437 U.S. 153, 187 n. 33 (1978). As the respondent concedes, KRS 208.170 is unambiguous insofar as it does not set a minimum age for the imposition of capital punishment. In the absence of any other evidence, legislative consideration of a minimum age for capital punishment cannot be divined from the mere fact that subsequent legislation specifically enacted a minimum age for capital punishment or that legislation which would have prohibited imposition of the death penalty on juveniles who were under 18 at the time of the crime was proposed but not enacted. (Respondent's Brief, p. 26).

The respondent asserts that the "[p]etitioner's interpretation of the *Thompson* concurrence would exempt juvenile murderers from *non-capital* punishments as well as from the death penalty." (Respondent's Brief, p. 28. Respondent's emphasis). Such an absurd notion could not be further from the truth and ignores a fundamental precept of Eighth Amendment jurisprudence, i.e. the "qualitative difference" between the death penalty and other punishments. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The petitioner has never suggested that society cannot subject juvenile offenders who commit serious crimes to lengthy terms of imprisonment. Indeed, severe sentences such as life imprisonment or life without parole are the obvious means by which society can protect itself from dangerous juvenile offenders and obtain a measure of retribution without putting the juvenile to death.

IV. Existence Of Safeguards Against Arbitrary Imposition Of Capital Punishment

On pp. 31-35 of its brief, the respondent argues that there is no need to automatically exempt juveniles from the death penalty because of numerous procedural safeguards that protect them against the arbitrary imposition of capital punishment. As examples of these safeguards the respondent cites procedures required by due process in juvenile court prior to a transfer decision and the use of mitigating evidence including the age of the accused. The respondent likewise identifies the proportionality review conducted by the Kentucky Supreme Court and a jury instruction on the petitioner's youth as further safeguards. (Respondent's Brief, p. 35). Finally, the respondent notes that the statute under which the juvenile court transferred jurisdiction of the petitioner's case to the circuit court (KRS 208.170), provided for grand jury reconsideration of the juvenile judge's transfer decision and also provided the circuit judge with the option of considering the transfer and returning the juvenile to district court for trial. (See KRS 208.170(5)(a) and (b); App. 1a, p. 2a of Petitioner's Brief).⁵

⁵ The respondent, however, has ignored the fact that these "safeguards" have been eliminated by Kentucky's present transfer statute (KRS 640.040).

The respondent recognizes the constitutional requirement that the accused be permitted to introduce mitigating evidence in the sentencing phase of a capital trial and the importance that youth has as a mitigating factor. However, the respondent has failed to refute the petitioner's arguments that he was denied the opportunity to fully present mitigating evidence, i.e., Robert Jones' testimony, and that youth and age are hollow safeguards because both concepts operate on a sliding scale which encompasses a wide range of chronological ages and therefore do little, if anything, to protect juveniles. Similarly, the respondent has not rebutted the petitioner's argument that the proportionality review conducted by the Kentucky Supreme Court is constitutionally inadequate because the petitioner's case was compared only to adults who received the death penalty and was also compared to one juvenile case in which the defendant's conviction and sentence were reversed. (See Petitioner's Brief, p. 40).⁶

The respondent's argument that juveniles who are under 18 at the time of committing a crime should be subjected to capital punishment is premised on the existence of the aforementioned procedural safeguards which the respondent perceives as being sufficient to prevent the arbitrary imposition of the death penalty. Yet, pointing to Section D of the petitioner's brief, the respondent argues that the petitioner has raised matters which cannot be fairly included in the question on which certiorari was granted. (Respondent's Brief, pp. 2-3). Section D, like Sections C and E of the petitioner's brief, simply demonstrates that these so-called safeguards are more illusory than real and

⁶ Throughout its brief, the respondent frames its arguments from the perspective that the petitioner is a young adult. Thus, the premise underlying the respondent's arguments is fundamentally flawed because our society and its laws recognize the petitioner to be a juvenile and not a young adult. For nearly all intents and purposes, society has set 18 as the boundary between childhood and adulthood. We live on either side of that boundary. A person is either a juvenile or an adult. There is no middle ground. Therefore, the focus of the respondent's argument is completely misdirected and is totally inconsistent with a fundamental precept of our society.

are meaningless because they do not eliminate the arbitrary imposition of capital punishment on a juvenile. Thus, Section D of the petitioner's brief does not exceed the fair parameters of the constitutional question presented by this case and addresses issues necessary for the proper disposition of the case. *Batson v. Kentucky*, 476 U.S. 79, 109-111 (1986) (Stevens, J., concurring). Where resolution of a particular question of law is a "predicate to an intelligent resolution" of the issue on which certiorari was granted and the parties have briefed that question of law, the Court must address it. *Vance v. Terrazas*, 444 U.S. 252, 258-259 n. 5 (1980) and *Cuyler v. Sullivan*, 446 U.S. 335, 343 n. 6 (1980). Issues which are "essential to analysis" of the question presented or "essential to [its] correct disposition" are "fairly comprised" by said question and therefore may be considered by the Court. *Procunier v. Navarett*, 434 U.S. 555, 559 n. 6 (1978); *United States v. Mendenhall*, 446 U.S. 544, 551 n. 5 (1980). See also *Eddings v. Oklahoma*, 455 U.S. 104, 114 n. 9 (1982) in which the Court held that the question of whether imposition of the death penalty was excessive comprised "the argument that the sentencer erred in refusing to consider relevant mitigating circumstances" during the sentencing hearing. These principles fully justify the inclusion of Sections C, D, and E in the petitioner's brief.

CONCLUSION

The arguments made by the respondent neither dissipate the strength of the arguments presented in the petitioner's brief nor justify affirmance of the decision of the Kentucky Supreme Court. Accordingly, the petitioner, Kevin N. Stanford, respectfully urges the Court to rule that the imposition of the death penalty on a juvenile who was under 18 years of age at the time of committing a crime violates the Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully, submitted,

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office

200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800

Counsel for Petitioner

**Counsel of Record*

J. DAVID NIEHAUS
Deputy Appellate Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District
Public Defender
Of Counsel

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

KEVIN STANFORD,

Petitioner,

v.

KENTUCKY,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Kentucky

**BRIEF OF THE OFFICE OF THE
CAPITAL COLLATERAL REPRESENTATIVE
FOR THE STATE OF FLORIDA,
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

SUSAN APEL*
MICHAEL MELLO
VERMONT LAW SCHOOL
P.O. Box 96, Chelsea St.
South Royalton, Vermont 05068
(802) 763-8303

Attorneys for Amicus Curiae

**Counsel of Record*

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INTEREST OF AMICUS CURIAE

Amicus has obtained the consent of the parties to file this brief.

The Office of the Capital Collateral Representative (CCR) was created by the Florida legislature, effective July 1, 1985, in response to the compelling need for effective assistance of counsel in postconviction proceedings for indigent prisoners sentenced to death. This new state agency is charged with representing indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in both the state and federal courts after direct appellate proceedings are concluded and the conviction and sentence have been affirmed. *See Fla. Stat. Ann.* § 27.702 (1987) (CCR enabling statute).

As the state agency expressly responsible—under a limited budget—for representing all indigent Florida prisoners under sentence of death, CCR has a critical interest in the establishment of age 18 as the minimum age for susceptibility to the death penalty. Presently, five Florida death row inmates were under age 18 at the time of their offenses; all are, or will become if their sentences are affirmed by the Florida Supreme Court on direct appeal, clients of CCR. The Florida Supreme Court has upheld the constitutionality of the death penalty for minors. *LeCroy v. State*, ___ So.2d ___, No. 69,484 (Fla. Oct. 20, 1988).

SUMMARY OF ARGUMENT

Amicus begins with the assumption—accepted by the plurality, concurrence, and dissent in *Thompson v. Oklahoma*—that there is “some age below which a juvenile’s crimes can never constitutionally be punished by death.” *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2706 (1988) (concurring opinion); *id.* at 2700 (plurality opinion); *id.* at 2718 (dissenting opinion). This case presents the question invited by such an assumption: At what age does this culture set the line? The answer is age 18. Throughout the American legal system, age 18 is the recognized dividing line between adult responsibilities and childhood. That is the only principled line here as well.

In most states and for most purposes, minority status—defined as lower than age 18—confers a host of legal disabilities. Minors are treated differently because minors *are* different. The diverse legal disabilities imposed upon minors are bottomed on the common sense and empirically supported notion that minors lack maturity, judgment, impulse control and experience.

Exemption of minors from capital punishment will not detract from the penological justifications for the death penalty. Jury behavior demonstrates that execution of minors would not materially advance the interest in retribution. Juries, the representatives of the community whose outrage is being expressed by death sentences, seldom vote to condemn minors.

Further, exclusion of minors from the death penalty would not abate the deterrent force of the penalty for other minors. Adolescents are less likely to make the kind of cost-benefit analysis that attaches weight to the possibility of execution. Exemption of minors from execution also would not dilute deterrence for adults, because adults would most likely not identify with condemned minors. And juvenile executions are so rare that preclusion of such executions would have little impact on the deterrence of the population at large.

ARGUMENT

THE EXECUTION OF A MINOR WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD VIOLATE EVOLVING STANDARDS OF DECENCY

The Court made clear in *Thompson* that *some* minimum age of susceptibility to the punishment of death must be recognized by a constitutional guarantee that brings to bear evolving standards of decency in fixing the outer boundaries of that criminal sanction. *Thompson*, 108 S. Ct. at 2700 (plurality); *id.* at 2706 (concurrency); *id.* at 2718 (dissent). The problem, of course, here as elsewhere in the evolution of constitutional law, resides in drawing the line. Shall it be 10, 12, 15, 18, 20, 21?

The inevitability of the difficult task of linedrawing is endemic to a Constitution that has chosen not to leave it to the vagaries of isolated juries and trial judges to determine exclusively and irremediably the state of our national conscience. If a constitutional line exists here—and *Thompson* shows that it does—the appropriate place to draw it is at least far clearer in relation to the present subject than in many constitutional areas. The overwhelming concentration of the relevant indicators fix age 18 as the line of full adult responsibility with a clarity that is not merely convenient but compelling when the gravest penal sanction of a society is sought to be exacted of its youth.

The cruel and unusual punishments clause of the eighth amendment, made binding upon the states through the fourteenth amendment, prohibits punishments that violate “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Those standards of decency are revealed by objective indicia such as legislative enactments and actual jury verdicts. *Thompson*, 108 S. Ct. at 2691 (plurality); *id.* at 2708 (concurrency); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Linedrawing here should be “informed by objective factors to the maximum possible extent.” *Coker*, 433 U.S. at 592.

A. In Most States And For Most Purposes, Age Eighteen Marks The Boundary Between Childhood And Adult Responsibilities

Throughout the American legal system, age 18 is recognized as the dividing line between adult responsibility and childhood. This line is reflected in the enactments of legislatures, the actual behavior of capital juries, the opinions of respected professional organizations, and the norms of international conduct.

1. Legislative Enactments

The “law has generally regarded minors as having a lesser capability for making important decisions,” *Carey v. Popula-*

tion Services International, 431 U.S. 678, 693 n.15 (1977), and "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring). Because of these distinctions, the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). The "State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent." *H. L. v. Matheson*, 450 U.S. 398, 421-22 (1981) (Stevens, J., concurring) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., dissenting)). The "experience of mankind, as well as the long history of our law, recogniz[es] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Goss v. Lopez*, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original). As the plurality observed in *Thompson*, "[i]t would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment." 108 S. Ct. at 2693 n.23 (plurality).

Minority status—meaning younger than age 18—universally confers a host of statutory disabilities. Eighteen years is the line selected by Congress and the states in their enactment and ratification of the twenty-sixth amendment to the Constitution governing voting age. Following extensive hearings, both state

and federal legislatures agreed to give constitutional significance to age 18 as the time when young people should first be permitted to participate in the most basic civic responsibility of adults in a democracy. See *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. (1970); Sen. Rep. No. 92-26, 92d Cong., 1st Sess. (1971); House Rep. No. 92-37, 92d Cong., 1st Sess. (1971). Eighteen also is the minimum age at which a citizen may be drafted into the armed services as well as the minimum age at which a person may enlist without parental consent. 50 U.S.C.A. app. § 454(a), (c) (1981).

In most states and for most purposes, a "minor" means one below age 18:

- All jurisdictions set the age of majority at age 18 or older. Forty-four jurisdictions set age 18 as the age of majority; two jurisdictions set the age at 21, three set it at 19, and two do not set a uniform age of majority. See Appendix A.
- "In no State may anyone below the age of 18 serve on a jury." *Thompson*, 108 S. Ct. at 4701 (Appendix B) (plurality). Forty-five jurisdictions require jurors to be 18 years or older, while three require jurors to be at least 19 years and three require jurors to be at least 21. See Appendix B.
- "No State has lowered its voting age below 18." *Thompson*, 108 S. Ct. at 2701 (plurality). See Appendix C.
- All jurisdictions but three require unemancipated minors to be 18 years old or older to marry without parental consent. In one jurisdiction, the minimum age is 19; in one jurisdiction the minimum age is 16; in another jurisdiction, females may marry at age 15 without parental consent. See Appendix D.
- Thirty-seven jurisdictions establish 18 as the age of consent for most forms of non-emergency medical treatment; one jurisdiction puts the age at 17, one jurisdiction puts the age at 16, one sets the age at 15, one jurisdiction puts the age at 14, two permit treatment if the minor is able to

understand the decision, and eight jurisdictions have no legislation in this area. *See* Appendix E.¹

- Thirty-four jurisdictions require a person to be age 18 to receive a driver's license without parental consent; four jurisdictions set the age at 17, while thirteen set it at 16. *See* Appendix F.

- In forty-one jurisdictions, a person must be age 18 to purchase pornographic materials; five jurisdictions set the age at 17, one jurisdiction sets it at 16, one sets it at 19, one has simply outlawed obscenity by statute, one has no specified minimum age, and one jurisdiction has no legislation in this area. *See* Appendix G.

- Of the thirty-nine jurisdictions which permit gambling, thirty-one set the minimum age at 18, four set it at 21, one sets it at 19, one at 17, and two at 16. *See* Appendix H.

- Of the twenty-two jurisdictions which set a minimum age for admission to pool halls, eighteen jurisdictions put the age at 18, three set the age at 16, and one puts it at 19. *See* Appendix I.

- Of the thirty jurisdictions which set a minimum age for the right to pawn property or to sell to junk or precious metal dealers, twenty-seven set the age at 18, while three set the age at 16. *See* Appendix J.

- Many localities have juvenile curfew ordinances. The "most common upper age limit" is 18. Comment, *Juvenile Curfew Ordinances and the Constitution*, 76 Mich. L. Rev. 109, 140 (1977).

Contemporary legislative attitudes toward minors are reflected further in the development of juvenile justice systems. "Juvenile courts exist because Americans admit to a fundamental difference between children and adults."

¹ The inequity of the death penalty for minors is illustrated by a vignette described in S. Gettinger, *Sentenced to Die* (1979). The mother of a condemned 15-year-old was asked by prison officials for parental consent to emergency treatment for her son, should he need it. The mother observed: "Now, isn't that ironic? . . . He's old enough to be put to death, but he's not old enough to get an aspirin without our consent." *Id.* at 150.

Institute of Juvenile Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Transfer Between Courts 1* (1980). Every state has a comprehensive juvenile court system, *Kent v. United States*, 383 U.S. 541, 554 n.19 (1966), the principal purpose of which is to rehabilitate and the premise of which is that minors are not fully responsible for their offenses and therefore should be treated more benignly than their adult counterparts. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White J., concurring); Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Transfer Between Courts 1* (1980); *The Juvenile Court and Serious Offenders*, 35 Juv. & Family Ct. J. (Preamble) (Summer 1984).

To be sure, the "fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized." *McKeiver v. Pennsylvania*, 403 U.S. at 543-44; *see also In Re Winship*, 397 U.S. 358 (1970). But the disappointments have turned more on "the availability of resources, on the interest and commitment of the public, on the willingness to learn, and on understanding as to cause and effect," *McKeiver* 403 U.S. at 547, rather than on fundamental flaws in the juvenile court philosophy. The Court's cases, such as *McKeiver* and *Winship*, confirm that virtually none of "[t]he serious critics of the juvenile court experiment . . . question the initial decision that adolescents ought to be handled in a legal process separate from adults. The battle is over the treatment of adolescents within the separate process." Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 8; *see also* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *Juvenile Delinquency and Youth Crime 9* (1967) (quoted in *McKeiver v. Pennsylvania*, 403 U.S. 528, 546 n.6 (1971)).

In particular, the legislation establishing juvenile court jurisdiction supports the proposition that age 18 is the relevant cut-off point between childhood and adult responsibilities. Thirty-seven states and the District of Columbia designate 18 years as the appropriate maximum age for juvenile court juris-

diction; one state sets the age at 19, eight set the age at 17, and four set the age at 16. S. Davis, *Rights of Juveniles: The Juvenile Justice System*, App. B (1986); National Institute for Juvenile Justice and Delinquency, U.S. Department of Justice, Major Issues in Juvenile Justice Information and Training, Youth in Adult Courts: Between Two Worlds 44, 86 n.2 (1982).

Most model standards reflect the judgment of the vast majority of jurisdictions which set age 18 as the boundary of juvenile courts. See United States Department of Health, Education and Welfare, Welfare Administration, Children's Bureau, Standards For Juvenile and Family Courts 36 (1966) (Successful experience in these courts over many years has established the soundness of this age level [18 years] of Jurisdiction"); National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act of 1968, § 2.1(i) (1979) (18 years); United States Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, Working Papers of the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, Jurisdiction—Delinquency, Vol. IV, at 10-11 (1977) (18 years); Institute of Judicial Administration/American Bar Association, Standards Relating to Transfer Between Courts, at Standard § 1.1A and Commentary (1980) (18 years); Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Juvenile Delinquency and Sanctions, Standard 2.1 and Commentary (1980) (18 years); Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 9 (1978) (18 years). The Institute of Judicial Administration and the American Bar Association, for example, proposed that the "eighteenth birthday should define an adult for the purposes of court jurisdiction" because the "eighteenth birthday signals the achievement of majority for many legal purposes. The twenty-sixth amendment to the United States Constitution establishes a constitutional right to vote in federal elections at that age. This near consensus among the states and the federal government argues compellingly that juvenile court jurisdiction should end at eighteen." Stan-

dards Relating to Transfer Between Courts, Commentary to Standard 1.1A.²

As to capital punishment specifically, the legislative message supports the notion that if an age must be chosen, eighteen is the only principled line. When Congress has set a minimum age for execution eligibility—as it did only months ago—that age was 18. Two-thirds of the states which have spoken on age and the death penalty have set the minimum age at 18. See Appendix L.

At the national level, the federal death penalty legislation recently enacted by Congress provides that a sentence of death "shall not be carried out upon a person who is under 18 years of

² While every state and the District of Columbia have a juvenile justice system, most jurisdictions also have mechanisms permitting transfer of otherwise juvenile cases into the adult criminal justice system. At least two states—Nebraska and Arkansas—do not provide for waiver of jurisdiction. S. Davis, *supra*, at 4-1. Yet, the broad consensus of the 38 jurisdictions that recognize age 18 as the general limit to juvenile court jurisdiction demonstrates that American society recognizes age 18 as a crucial watershed in an individual's development. Whatever courts may be chosen to try a juvenile under 18 charged with murder by operation of transfer provisions, evolving standards of decency forbid the execution of such an offender.

This conclusion is consistent with the rationale underlying transfer provisions: namely, there are certain juveniles who will require punishment or treatment beyond the age of 18, the jurisdictional limitation for most juvenile courts. By permitting transfer of these juveniles to the adult system, these courts gain jurisdiction to ensure that the penal system will have sufficient time both to exact the necessary punishment and to attempt rehabilitation. Even where transfer follows an evidentiary proceeding, however—as in Oklahoma in *Thompson*—the decision to transfer a juvenile into the adult court system does not turn on questions of individualization and criminal responsibility, both constitutionally indispensable in deciding whether to impose the death penalty. Transfer and capital sentencing simply ask different questions. Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. & Criminology 1471, 1499-1501 (1983).

age at the time the crime was committed." Cong. Rec.—House 11172 (Oct. 21, 1988). When federal death penalty legislation was proposed in 1986, no minimum age was specified. An amendment to the bill, setting 18 as the minimum age, passed without recorded disagreement. See *Establishing Constitutional Procedures for the Imposition of Capital Punishment: Report of the Committee on the Judiciary*, 99th Cong., 2d Sess. 30 (1986).

At the state level, protection for minors under death penalty statutes has increased dramatically in the past quarter century. A 1961 Associated Press survey of legal possibilities in criminal proceedings involving juveniles showed a much harsher legal environment. New York Times, Jan. 7, 1962, at 81, col. 1. Of forty-one death penalty states at that time, the minimum age for the death penalty was age 7 in sixteen states, age 8 in three states, age 10 in three states and ages 12 to 18 in nineteen states. *Id.*

The situation today is quite different. Thirteen states and D.C. have rejected capital punishment completely. Of the 37 states retaining the death penalty, 19 set no minimum age. *Thompson* 108 S. Ct. 2694 (plurality). It can hardly be said that the states with no minimum age have deliberately authorized execution of one under 18, for there is no evidence that these states "realize[d] that [their] . . . actions would have the effect of rendering [minors under the age of 18] death-eligible or . . . [gave] the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." *Id.* at 2711 (concurrence).

Eighteen states expressly exclude youths under age 16, 17 or 18 in their death penalty statutes. *Id.* at 2696 (plurality); Appendix L. Of these eighteen states, twelve states—a full two-thirds—establish a minimum age of 18;³ three states, set

³ Although there is some confusion about New Hampshire, *amicus* counts New Hampshire as an age 18 state. See N.H. Rev. Stat. § 630.5 (XIII) (Supp. 1987) (prohibiting execution of one who was a minor at time of crime); *id.* at § 21-B:1 (Supp. 1987) (age 18 is age of majority); but see *id.* at § 630:1(v) (1986) (no one under age 17 shall be

an age 17 limit; three states have a minimum age of 16. 108 S. Ct. at 2696 n.30; Appendix L.

Further, most recent legislative activity has been in the direction of setting 18 as the minimum age. Seven of the twelve states with an age 18 minimum selected that age within the past seven years. Ohio in 1981 set 18 as its minimum age for execution; Nebraska did so in 1982; Tennessee in 1984; Colorado and Oregon in 1985; New Jersey in 1986. See Ohio Rev. Code Ann. § 2929.02(A) (Page 1987); Tenn. Code Ann. §§ 37-1-102(3), (4) (Supp. 1987); 37-1-103 (Repl. 1984), 37-1-134(a)(1) (Repl. 1984); Neb. Rev. Stat. § 28-105.01 (1985); Colo. Rev. Stat. § 16-11-103 (Repl. 1986); Or. Rev. Stat. § 161-620 (Supp. 1987); N.J. Stat. Ann. § 2C: 11-3g (West Supp. 1988).

In April 1987, Maryland became the latest state to set 18 as the minimum age for capital punishment. Barnes & Schmidt, *Schaefer Praises Session As "Unusually Successful,"* Washington Post, April 14, 1987, at A7. The Maryland Governor was "struck by the fact that the decisive Senate votes came not from the newly-elected members of that Chamber, but from Senate veterans who had opposed an exemption for minors in previous years." See Letter from William Schaefer to Clayton Mitchell, Speaker, Maryland House of Delegates, April 7, 1987, at 1 (reproduced at Appendix K). The Maryland House of Delegates, in putting the age at 18, reversed the Maryland House Judiciary Committee, which had set the age at 16. Barnes, *Death Penalty Exemption Advances*, Washington Post, April 11, 1987, at B4.

The recent legislative activity in Georgia, Indiana and Kentucky does not contraindicate the trend toward setting the minimum age at 18. The Georgia legislature in 1987 declined to increase its minimum age from 17 to 18. Yet the 1987 *Report of*

held culpable for a capital offense). New Hampshire has *never* executed a person who was under age 18 at the time of the offense. V. Streib, *Death Penalty for Juveniles* 200 (1987). In the history of New Hampshire's post-*Furman* capital statute, no one under age 18 has been sentenced to death in that state.

the Georgia House Age of Criminal Responsibility Study Committee found that "a scientific poll conducted by Georgia State University and the bulk of testimony received by the Committee indicates that a majority of Georgians favor changing Georgia's law to make life imprisonment, instead of the death penalty, the maximum penalty for minors." *Id.* at 18. Not since 1957 has Georgia executed one who was less than age 18 at the time of the crime. *V. Streib, supra*, at 195.

Indiana passed its 16 year-old minimum in 1987. The Indiana legislature had before it two bills, one calling for age 16 and one calling for age 18. Primarily to avoid controversy, the Committee on Courts and Criminal Code of the Indiana House of Representatives chose to move forward with the age 16 bill rather than the age 18 bill. Over 90% of the membership of both houses (Senate and House of Representatives) voted in favor of the bill, and it was signed into law without delay by the Governor. *See* Bloomington (Ind.) Herald-Telephone, Mar. 26, 1987, § C, at 12, col. 2. Given this overwhelming support for a minimum age of 16, it seems likely that the age 18 bill would also have passed, albeit by a narrower margin. Indiana has not carried out a minor execution since 1920. *V. Streib, supra*, at 195.

The Kentucky legislature enacted a minimum death penalty age of 18 as part of a major juvenile court reform act in 1980 and again in 1982. *See* Louisville (Kentucky) Courier-Journal, Mar. 11, 1986. However, funding problems prevented this major act from ever being implemented, and it was repealed in 1984—rather incidentally taking the minimum death penalty age with it. *Id.* As a stop-gap measure, in 1986 the Kentucky legislature enacted a minimum age of 16. On February 17, 1988, the Kentucky House of Representatives voted 60 to 29 to raise the minimum age back to 18. However, the Kentucky Senate Judiciary-Criminal Committee did not get to hearings on the bill. Thus, it seems fair to characterize Kentucky as having been at age 18 and as trying to get back there. It certainly is not locked in permanently at age 16. Kentucky has not executed a person for a crime committed while lower than age 18 since 1945. *V. Streib, supra*, at 196.

In any event, capital statutes are not determinative. The legislatures that permit execution for crimes committed by minors do not deem those same minors sufficiently mature to vote, sit on a jury or engage in a wide variety of adult activities. Further, as *amicus* will now show, capital statutes authorizing the death penalty for minors have led to only a minuscule number of juvenile death sentences. Death penalty legislation alone cannot reveal society's evolving standards of decency.

2. Jury Determinations

In addition to legislative enactments, the "second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries." *Thompson*, 108 S. Ct. at 2697. In the decade and a half since *Furman v. Georgia*, 408 U.S. 238 (1972), almost every current Justice has written or joined in opinions that look to the pattern of jury verdicts in support of a conclusion about the death penalty's constitutionality, either generally or for particular crimes.

Members of the Court have reasoned that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," *Enmund*, 458 U.S. at 795 (White, Brennan, Marshall, Blackmun & Stevens, JJ.) (quoting *Gregg v. Georgia* 428 U.S. 153, 181 (1976) (Stewart, Powell & Stevens JJ.)), and that "it is thus important to look at the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker*, 433 U.S. at 596 (White, Stewart, Blackmun & Stevens, JJ.). In *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976), a plurality consisting of Justices Stewart, Powell and Stevens cited jury refusal to convict in mandatory capital cases to support its conclusion that the mandatory statutes did not reflect evolving standards of decency. In *Lockett v. Ohio*, 438 U.S. 586, 625 (1978), Justice White wrote, in concurrence, that the death penalty could not be used if the defendant did not intend the death of the victim, even though at the time "approximately half of the states [had] not legislatively foreclosed the possibility of imposing the death

penalty upon those who did not intend to cause death." The reasoning of Justice White's concurrence in *Lockett* was endorsed by the Court in *Enmund v. Florida*, with both the majority, *see* 458 U.S. at 795, and the dissent, *see id.* at 818-20 (O'Connor, J., joined by Burger, C.J., Powell & Rehnquist, JJ.), analyzing the behavior of capital juries. The majority in *Enmund* relied on statistics showing that despite these statutes, defendants in this category rarely were sentenced to death. Justice Brennan, in *Furman*, also relied on the gap between legislative authorization of capital punishment and the number of death penalties actually inflicted:

When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it.

Furman, 408 U.S. at 300 (Brennan, J., concurring). In *Coker*, 433 U.S. at 596, a plurality consisting of Justices Stewart, White, Blackmun and Stevens cited *Gregg's* observation that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved."

Thus, the Court, while considering legislation as one measure of society's evolving standards of decency, still looks beyond those judgments to learn whether they are accurate. There is a good reason to do so:

Each lawmaker confronts capital punishment abstractly. No life depends on her vote. Legislative response tells us the degree to which we are willing to have laws permitting execution, but sentencing and execution tell us the degree to which we are willing to carry them out. A statute, furthermore, is static. It remains until changed. As public opinion shifts, older statutes become less reliable indicators of current values. Forces influence legislators that do not affect jurors. A legislator may believe, for example, that death penalty proponents in his constituency are more likely than its opponents to be single-issue voters or are more likely to organize against him, if he opposes capital punishment, than will opponents if he supports it. A constituency's willingness to vote based on a single issue and its degree of organization likely influence a lawmaker's decision and may skew the degree to which the pattern of

legislation reflects community sentiment. Of course, legislative action may accurately reflect community sentiment on the acceptability of the death penalty, either generally or in classes of cases. But without a pattern of jury response, we cannot know whether this is true or whether, instead, various political factors have combined to obscure the community view. The jury, because it is so directly involved, is needed to avoid guessing wrong.

Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 72-73 (1980) (footnotes omitted).

The actual practice of sentencing minors to die, and of actually executing them, has declined to a remarkably low level. In the 6 1/2 year period from January 1, 1982 through June 30, 1988, 1,813 death sentences were imposed by juries throughout the United States. Only 41 (2.3%) of these death sentences were imposed on individuals for crimes committed while under the age of 18. *See* Appendix R. During this same 6 1/2 year period, 1.7% (1,813 of 105,997) of adults arrested for criminal homicide in the United States received the death sentence, a small portion. A microscopically small portion, only 0.5% (41 out of 8,911), of minors (younger than 18) arrested for criminal homicide received the death penalty.

Moreover, while the number of adult death sentences remained fairly constant at a rate of 250 to 300 per year, the number of minor death sentences declined in recent years. The decline is revealed by the changing populations on death row. As Appendix O indicates, thirty-eight (3.1%) of the 1,209 persons on death row as of December 31, 1983, were under death sentences for crimes committed as minors. During the next 5 1/2 years, the total death row population had a net increase of 69% (1,209 to 2,048), but the minor death row population had a net decrease of 26% (from 38 to 28). *See* Appendix O and Appendix P. Three juvenile executions occurred during this period. The remaining cases were removed from death row pursuant to post-trial litigation.

Data compiled through June 1988 established that the minor capital-sentencing rate has leveled off at a dramatically low level. Over the last six years, those under age 18 at the time of the crime have been sentenced to death as follows: 1982—11;

1983—9; 1984—6; 1985—5; 1986—7; 1987—2; 1988 (first 6 months)—1. See Appendix R. During this same period, the annual death-sentencing rate for adults has been approximately 300 per year.

Minors comprise only 1.4% of the total present death row population. As of June 30, 1988, only 28 of the 2,048 persons on death row had committed their crimes while under age 18. See Appendix P. Of these 28 people presently under a death sentence for crimes committed at age 17 or younger, two (Paula Cooper and Troy Dugar) should have their death sentences vacated based on the combined plurality and concurring opinions in *Thompson*. Juvenile death sentences have become so rare that they are cruel and unusual "in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. 309 (Stewart, J., concurring).

Admittedly, this data does "not indicate how many juries have been asked" to impose the death penalty for crimes committed below the age of 18 or "how many times prosecutors have exercised their discretion to refrain from seeking the death penalty in cases where the statutory prerequisites might have been proved." *Thompson*, 108 S. Ct. at 2708 (concurrency). State record-keeping makes the collection of such information all but logistically impossible. In states where the data is obtainable, however, such data supports the proposition that prosecutors are reluctant to seek, and that juries are reluctant to impose, the death penalty on minors.

In Missouri, for example, the data is available from materials gathered from that state's conduct of proportionality review. "Only one Missouri youth has been sentenced to die who was seventeen years old or younger as of his crime." *State v. Wilkins*, 736 S.W.2d 409, 420 (Mo. 1987) (Donnelly, J., dissenting), cert. granted, 108 S. Ct. 2896 (1988). Between 1978 and 1988, 13 juveniles went on trial in Missouri for potentially capital offenses. In six cases—almost half—the prosecutors exercised their discretion not to seek the death penalty. Of the seven remaining cases that reached penalty phase, juries voted for life imprisonment in six cases. Of those six cases where juries returned verdicts of life, one involved crimes committed

by a 16 year old and four involved crimes committed by 17 year olds. Only once in its 10-year post-*Furman* history has a Missouri jury voted to condemn one who was a minor at the time of the offense. During this same period, Missouri juries sentenced 69 adults (18 years old or older) to death. See Appendix S.

Similarly, in Mississippi, nine minors were indicted for capital murder between 1976 and 1981. Of these nine, prosecutors did not seek the death penalty in five cases—more than half. Four of the nine were charged capitally, and all four were convicted. None received the death penalty. See Database of R. Berk & J. Lowrey, Univ. of California, Santa Barbara, from Factors Affecting Death Penalty Decisions in Mississippi (1985) (unpublished paper).

Executions for crimes committed while under age 18 have been extremely rare in this century—only 2.6% of all executions. See Appendix M. Of the 101 people executed in the post-*Furman* era, only three were under the age of 18 at the time of the offense. One of the three volunteered for execution. A 20-year national hiatus in the execution of people who were minors at the time of their crimes ended when Charles Rumbaugh was executed in 1985. Rumbaugh was 17 years old at the time of the crime. Rumbaugh, however, as an adult in his twenties and after a full evidentiary hearing on his competency to waive further legal action to save his life, volunteered for execution. *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir. 1985), cert. denied, 473 U.S. 919 (1985). Early in 1986, Terry Roach became the first nonconsensual execution of a minor since 1964; Roach, however, did not allege in his first federal habeas corpus proceeding that execution of a minor per se violates the Constitution. *Roach v. Martin*, 757 F.2d 1463 (4th Cir. 1985), cert. denied, 474 U.S. 865 (1985). Similarly, Jay Pinkerton, executed later in 1986, apparently did not raise the claim in his first habeas petition.

3. Respected Professional Organizations

The conclusion that it would offend civilized standards of decency to execute a person who was less than age 18 at the

time of the offense is consistent with the views that have been expressed by "respected professional organizations." *Thompson*, 108 S. Ct. at 2696 (plurality). The limitation of eligibility for the death penalty to those 18 years or older at the time of the offense is supported by the American Bar Association, the National Council of Juvenile and Family Court Judges, the American Law Institute's Model Penal Code, and the National Commission on Reform of Federal Criminal Laws.

The ABA passed a resolution in 1983 opposing "the imposition of capital punishment upon any person for any offense committed while under the age of eighteen." See American Bar Association Report No. 117A, approved August 1983. This resolution is especially significant because it is the first time in its history that the ABA has taken a formal position on any aspect of capital punishment.

On July 14, 1988, the National Council of Juvenile and Family Court Judges, one of the oldest and largest judicial membership organizations, passed a resolution opposing "capital punishment of those who committed an offense while under the age of eighteen years." Resolution Number 2, National Council of Juvenile and Family Court Judges (July 14, 1988). The American Law Institute's Model Penal Code has, since 1962, contained a recommendation that the death penalty not be imposed on offenders below age 18. See American Law Institute, Model Penal Code § 210.6(1)(d) (Proposed Official Draft 1962). This view was reaffirmed by revisers of the Code in 1980, despite suggestions that the age be lowered or that youth merely be considered as a mitigating circumstance. See American Law Institute, Model Penal Code § 210.6, Comment, at 133 (Official Draft and Revised Comments 1980). The National Commission on Reform of Federal Criminal Laws also took the position that 18 ought to be the minimum age. See National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code § 3603 (1971).

4. Other Nations

That it would offend civilized standards of decency to execute a person who was less than 18 years old at the time of the

offense also finds support in the views that have been expressed by "other nations that share our Anglo-American heritage." *Thompson*, 108 S. Ct. at 2696 (plurality).

The domestic legislative evidence that age 18 is the appropriate boundary between minority and adult responsibility coincides with international law. Although incomplete, "[t]he available evidence of contemporary state practice in the application of the death penalty seems to establish a remarkably consistent adherence to the prohibition on execution of juvenile offenders in all regions and political systems." Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. Cin. L. Rev. 655, 666 (1983). Of the 164 countries for which data was available, 122 imposed the death penalty. Significantly, of these 122 countries, 45 had statutory provisions recognizing youth as exempt from the death penalty: 29 of the 45 nations (65%) set the minimum age at 18, one (2%) set the age at 21, three (7%) at age 20, five (11%) at age 16, and five (11%) prohibited the execution of "minors" while two others (4%) prohibited the execution of "young people." *Id.* at 666-67 n.44. Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under 18 years of age." See United Nations, Economic and Social Council, Report of the Secretary General, *Capital Punishment* 17 (1973).

The significance of these figures is not only that nations set a minimum age, but that two-thirds of those which do set the age at 18. It is telling that the 28 condemned juveniles on America's death row could not have been sentenced to death if they had been convicted in the Soviet Union, China, Iraq, or South Africa.

Equally significant, of 81 nations which were reported to have actually executed persons in the period between 1973 and 1982, only two states officially reported executions of minors. Hartman, *supra*, at 666-667 n.44. Out of the 11,000 executions in over 80 countries recorded by Amnesty International throughout the world between January 1980 and May 1986, only eight executions (0.07%) in four countries were reported

to have been of persons who were under age 18 at the time of the crime. See Amnesty International, *United States of America: The Death Penalty* 74 (1987). Three of the eight executions were in the United States, two were in Pakistan, and one each was in Bangladesh, Rwanda and Barbados. *Id.* There were also undocumented reports of juvenile executions in Iran. *Id.* Even if executions of minors abroad are underreported, these numbers remain compelling. A nation's unwillingness to admit execution of minors is itself evidence of a norm against that practice.

Three major human rights treaties explicitly prohibit juvenile death penalties. See Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); Article 4(5) of the American Convention on Human Rights, OAS Official Records, OEA/Ser. K/XVI/1.1, Doc. 65 Rev. 1 Corr. 1 (1970); Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Each of these treaties prohibits the death penalty for crimes committed below the minimum age of 18.

The United States Government has ratified the Geneva Convention, and has signed but not yet ratified the other two conventions. However, a United Nations General Assembly Resolution recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all member states, not only ratifying states. Hartman, *supra*, at 681 n.94. This resolution was supported by the United States Government. *Id.*

5. Conclusion

The laws and policies discussed in this section reflect an almost universal judgment that minors ought to be treated differently from adults. Generally, there are not exceptions to that judgment. Public officials do not consider requests by especially mature minors to allow them to vote, serve as jurors, or drink alcoholic beverages. As a society, we treat those under age 18 as categorically different from adults. These lines reflect

clear distinctions between children and adults, distinctions that require the Court to draw the line at age 18 for the imposition of the death penalty.

B. The Reasons For Treating Minors Differently From Adults Apply With Special Force Here: The Developmental Differences Between Adolescents And Adults Diminish The State's Interest In Inflicting The Death Penalty On Minors

The "Constitution contemplates that in the end [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, 433 U.S. at 597; accord *Enmund*, 458 U.S. at 797; *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976). This independent judgment is informed by "the two principal social purposes" of the death penalty: "retribution and deterrence." *Thompson*, 108 S. Ct. at 2699 (plurality) (quoting *Gregg*, 428 U.S. at 183); see also *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring); *Enmund*, 458 U.S. at 798-99. Execution of minors is not consistent with either of these goals.

1. Retribution

The Court has said that retribution—the expression of society's outrage at particularly offensive conduct—is a legitimate penological goal of capital punishment. *Thompson*, 108 S. Ct. at 2699 (plurality); *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984); *Enmund*, 458 U.S. at 800-01; *Gregg*, 428 U.S. at 183. But such outrage is tempered when the defendant is a minor. *Juries*, the representatives of the community whose outrage is being expressed by death sentences, seldom vote to condemn minors.

It is no accident that even in an era in which the public perceives a significant increase in juvenile crime and where public support for capital punishment is overwhelming, juries almost never vote to execute minors. Lay jurors, given the task of expressing the common sense judgment of the community, recognize that adolescents are developmentally distinct from adults, that adolescents grow up, and that young people are

uniquely capable of being rehabilitated. Juries recognize that it is unrealistic and inhumane to treat young offenders as if they have fully mature judgment and control.

In refusing to vote for the ultimate retribution for minors, juries recognize the common sense and empirically supported assumption that minors lack the maturity, experience, sophistication and judgment necessary to make many important decisions. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson*, 108 S. Ct. at 2699 (plurality). "Children, by definition, are not assumed to have the capacity to take care of themselves." *Schall v. Martin*, 467 U.S. 253, 265 (1984). That assumption is why the death penalty ought to be limited to adults.

"Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *Eddings*, 455 U.S. at 116 n.12 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). The Court has often expressed the rationale underlying this distinction, explaining that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. 622 (1979); see also *H. L. v. Matheson*, 450 U.S. at 409-11.

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (footnote omitted); see also *Skipper*, 476 U.S. at 12 (Powell, J., con-

curing); *New York v. Ferber*, 458 U.S. at 776 (Brennan & Marshall, JJ., concurring) (noting "the particular vulnerability of children"); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions"); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees").

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Eddings, 455 U.S. at 116 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *supra*, at 7); see also *Skipper*, 106 S. Ct. at 1675 (Powell, J., concurring); *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

"Adolescence is well recognized as a time of great physiological and psychological stress." *Thompson*, 108 S. Ct. at 2699 n.42 (plurality) (quoting Lewis, Pincus, Bard, Richardson, Pricep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 14 Am. J. Psychiatry 584, 588 (1988)). The Court has long recognized the "period of great instability which the crisis of adolescence produces." *Haley*, 332 U.S. at 599.

During the "crisis of adolescence," *Haley*, 332 U.S. at 599, minors are less mature in their ability to make sound judgments and are less able to control their conduct and to recognize the consequences of their acts. Adolescence is a time when young persons are struggling to arrive at a definition of their

own identity; adolescents are particularly likely to rebel against adult authority and to seek affirmation by their peers. E. Erikson, *Childhood and Society* 261-63 (2d ed. 1963). Adolescents are particularly emotionally dependent on other people. They are especially vulnerable to influences from peers. "The transition from childhood to adolescence is marked more by a trading of dependency on parents for dependency on peers rather than straightforward and unidimensional growth in autonomy." Steinberg & Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *Child Development* 841, 848 (1986).

The adolescent's intellectual capacity to consider and to choose from the realm of possibilities in a comprehensive fashion emerges only in late adolescence and early adulthood. E. Peel, *The Nature of Adolescent Judgment* 153 (1971). Moral character is to a large degree a product of the maturation process. Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 409 (M. Hoffman & L. Hoffman eds. 1964); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues*, 49 *Child Development* 263 (1978). Most adolescents simply do not have the breadth and depth of experience which are essential to making sound judgments and to understanding the long-range consequences of their decisions. The predicate for the death penalty—society's outrage at a defendant's reprehensible moral judgments—cannot apply when the defendant lacks the capacity to engage in fully-formed moral judgments.

Further, most adolescents grow up. "For most adolescents, age alone is the cure of criminality." F. Zimring, *Background Paper*, in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* (1978); J. Wilson & R. Herrnstein, *Crime and Human Nature* 144 (1985). For this reason, the diagnosis of antisocial personality cannot be applied until an individual has reached 18 years of age. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 319 (3rd ed. 1980). Youth is a "time of intense and unfulfilled passions, leading to crimes for goods and pleasures that older people either crave

less or can enjoy legally." J. Wilson & R. Herrnstein, *supra* at 145. Simply stated, an adult is likely to have a lower propensity for crime than a youngster because the adult is older. In this regard, "[a]ge, like gender, resists explanation because it is so robust a variable. None of the correlates of age, such as employment, peers, or family circumstances, explains crime as well as age itself." *Id.* (footnotes and reference omitted) (emphasis added).

Finally, the philosophical premises of retribution fail when applied to minors. The morality of the anger which fuels the desire for retribution is based on the killer's violation of the social compact. Society has entrusted its citizens with rights, one of which is freedom, and the murderer has grossly abused that freedom. W. Berns, *For Capital Punishment* 155 (1979). The fallacy of this retributive argument as it applies to minors is precisely that society does *not* entrust minors with such freedom.⁴ States do not trust their minors to vote, sit on juries or engage in a wide variety of adult activities.

2. Deterrence

The "death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper*, 476 U.S. at 13 (Powell, J., concurring). The death penalty may be expected to deter only those who engage in a "cold calculus that precedes the decision to act," those who "carefully contemplate[]" their crimes. *Gregg*, 428 U.S. at 186; see also *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting); W. Bowers, *Legal Homicide* 272 (1984). "The socialization processes, which include the internalization of a society's moral norms and prohibitions, undoubtedly play a role

⁴ John Stuart Mill's *On Liberty* set forth, in 1859, the classic anti-paternalist position. J.S. Mill, *On Liberty* (Penguin Classics 2d ed. 1986). Mill's logic is utilitarian and argues for the absolute prohibition of state paternalism. Yet Mill found it "hardly necessary to say that [his] doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood." *Id.* at 69.

in general deterrence." Gale, *Retribution, Punishment, and Death*, 18 U.S. Davis L. Rev. 973, 995 (1985) (footnote omitted).

With adolescents, the socialization process is as yet incomplete; for this reason, capital punishment will not likely deter other minors from committing crimes. "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." *Thompson*, 108 S. Ct. at 2700 (plurality). Even if one posits such a cool-headed calculation by a minor, "it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed in the 20th century." *Id.*

"Normal adolescents are distinguished from adults by their intensity of feeling, immature judgment, and impulsiveness." Lewis, Pincus, et al., *supra*, at 588. "[I]mmature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences" *Bellotti*, 443 U.S. at 640-41. Adolescents live for the moment, for "an intense present," with little thought of the future consequences of their actions. Kasterbaum, *Time and Death in Adolescence*, in *The Meaning of Death* 99, 104 (H. Feifel ed. 1959). The defiant attitudes and risk-taking behaviors of some adolescents are related to their "developmental state of defiance about danger and death." Fredlund, *Children and Death From the School Setting*, 47 J. School Health 533, 535 (1977). They typically have not learned to accept the finality of death. Hostler, *The Development of the Child's Concept of Death*, in *The Child and Death* (O. Sahler ed. 1978). Adolescents tend to view death as a remote possibility; old people die, not teenagers. "Risk-taking with body safety is common in the adolescent years, through sky diving, car racing, excessive use of drugs and alcoholic beverages." Gordon, *The Tattered Cloak of Immortality*, in *Adolescence and Death* 27 (C. Coor & J. McNeil eds. 1986). Such "chance games" are played by adolescents "out of their own sense of omnipotence." Miller, *Adolescent Suicide: Etiology & Treatment*, in *Adolescent Psychiatry* 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981).

The teen years are "a period of experiment, risktaking and bravado." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *supra*, at 3. Adolescents are particularly likely to rebel and to seek affirmation by their peers. E. Erikson, *supra*, at 261-63. Many adolescents possess a "profound conviction of their own omnipotence and immortality. Thus many adolescents may appear to be attempting suicide, but they do not really believe that death will occur." Miller, *supra*, at 329; see also Hostler, *supra*, at 19. For this reason, threatening an adolescent with death will not have the same impact as threatening an adult with death.

Adolescents are less likely than adults to calculate consequences rationally; this, indeed, is the premise underlying the states' guardianship and protection of minors. It is unlikely that cold, rational calculation of risks and consequences is involved when minors commit crimes. See C. Bartollas, *Juvenile Delinquency* 102 (1985). The legal culture assumes for countless other purposes that minors, prior to acting, do not engage in the sort of responsible risk-benefit analysis that lies at the core of the deterrence theory. As *amicus* has discussed above, when adolescents do calculate, the fear of death will not be given its fair measure. Adolescents have not learned to accept death's finality.

Moreover, execution of minors will fail to deter the general population from committing crimes. Potential murderers are most likely to be deterred by the execution of one with whom the potential killer can identify; put another way, execution of a person who is particularly distinguishable from the general population will not serve to deter members of the general population. Cf. A. Goldstein, *The Insanity Defense* 13 (1967); Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate: Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 813-17 (1978). Exclusion of minors from execution would not abate the deterrent force of the death penalty for adults. Finally, because juvenile executions are so rare, their preclusion would have little impact on the deterrence of the population at large. See generally Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. & Criminology 1471, 1510-13 (1983).

C. There Is No Viable Basis For Distinguishing Among Minors For Purposes Of Administration Of The Death Penalty

The quandary of line-drawing among minors is, of course a dilemma that the Court has faced on prior occasions. In numerous cases, in numerous factual contexts, the Court has consistently sounded a single, overarching theme: that minors—simply by virtue of their status as minors—can be deprived of the rights and privileges of adults. The Court's decisions sanctioning legal disabilities for minors treat juveniles as a coherent class, and establish the age of majority as the demarcation between the period of childhood and the period of adulthood. *E.g.*, *Ginsberg*, *supra*; *Parham*, *supra*; *Schall*, *supra*.

It is instructive to consider the context in which the Court has previously decided questions of juvenile law. Typically, the question presented is whether—a certain minor, or class of minors, is sufficiently mature or sophisticated to be treated as an adult and freed of a statutory or administrative restriction that affects all young people. The Court has repeatedly rejected such attempts to draw distinctions between subgroups of minors, and instead has relied on generalizations about the unique nature of childhood and the universal characteristics of children, to treat minors as a single coherent class. *E.g.*, *Schall*, 467 U.S. at 265 (“[c]hildren, by definition, are not assumed to have the capacity to care for themselves”); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (upholding the state's right to restrict a minor's employment opportunities, because “[t]he state's authority over children's activities is broader than over like actions by adults”).

The series of decisions addressing the privacy rights of a young woman to an abortion constitute the only factual context in which the Court has tolerated case-by-case determinations on the basis of the relative maturity or immaturity of individual youths. See *Planned Parenthood of Missouri*, *supra*; *Bellotti*, *supra*; *H.L. v. Matheson*, *supra*. However, the Court has permitted such case-by-case determinations only in order to avoid irrevocable harm. In *Bellotti*, the Court recognized that “considering her probable education, employment skills, finan-

cial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor.” 443 U.S. at 642. Accordingly, the Court struck down a parental veto statute that would have imposed the “grave and indelible” consequences of “unwanted motherhood” upon mature minors who were capable of rationally considering the alternatives. *Id.*

Unlike the prior cases involving minors' rights, where an individual minor (or a litigant acting on behalf of the minor) sought to divide artificially the general class of minors into subclasses of mature and immature minors for the sake of expanding mature minors' rights, here it is the State that is asking the Court to engage in such artificial case-by-case decision making. The State asserts, in effect, that certain minors are sufficiently mature and sophisticated so as to fall outside the general category of youth and be subjected to the perquisites (here, the penalties) of adulthood.

The case-by-case decisionmaking urged by the State cannot be squared with the Court's prior decisions in the area of minors' rights. There can be no justification for employing a one-way analysis that forbids case-by-case decisionmaking for the sake of *expanding* minors' rights while employing that very same form of decisionmaking for the sake of *extinguishing* the greatest of all rights, the right to life.

The only principled distinction between minority and adulthood in the context of capital punishment is the very same distinction that the Court and legislatures have repeatedly used in defining the rights of minors: the age of majority—which almost universally means age 18. For this reason, the Court should rule that people who were minors at the time of the offense cannot be executed.

CONCLUSION

The Court should hold that execution of people who were younger than age 18 at the time of their offense violates the eighth and fourteenth amendments.

Respectfully submitted,

SUSAN APEL

(Counsel of Record)

MICHAEL MELLO

VERMONT LAW SCHOOL

P.O. Box 96, Chelsea St.

South Royalton, Vermont 05068

(802) 763-8303

*Attorneys for Amicus Curiae**

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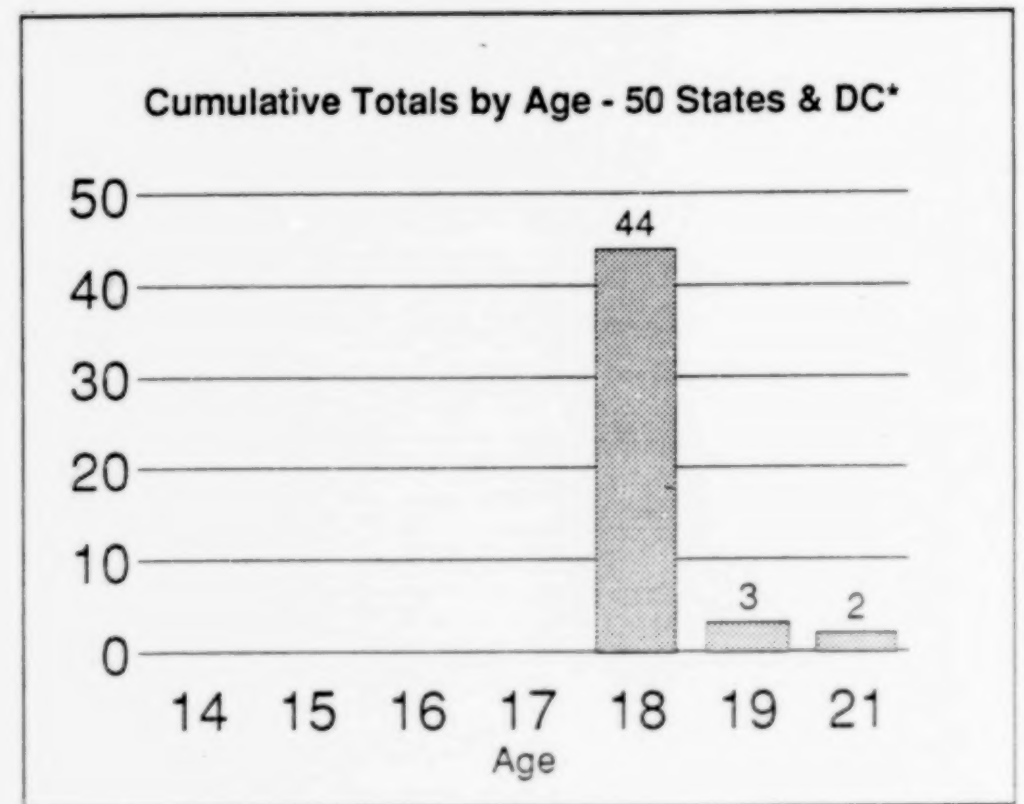
*Counsel gratefully acknowledge the valuable assistance of Bettina Buehler, Judith Dillon, and Lynn Felici, law students at Vermont Law School, in the preparation of this brief.

APPENDIX

(a1)

APPENDIX A

Age of Majority



*Two states (MO and NY) have no uniform age of majority.

(a2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	19	Ala. Code § 26-1-1 (1986)
AK	18	Alaska Stat. § 25.20.010 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 1-215 (1974)
AR	18	Ark. Stat. Ann. § 9-25-101 (1987)
CA	18	Cal. Civil Code § 25.1 (West 1982)
CO	18	Colo. Rev. Stat. § 13-22-101 (1974)
CT	18	Conn. Gen. Stat. § 1-1d (Supp. 1988)
DL	18	Del. Code Ann. tit. 1, § 701 (1975)
DC	18	D.C. Code Ann. § 30-401 (1981)
FL	18	Fla. Stat. Ann. § 743.07 (West 1986)
GA	18	OCGA § 39-1-1 (1982)
HI	18	Haw. Rev. Stat. § 577-1 (Repl. 1985)
ID	18	Idaho Code § 32-101 (1983)
IL	18	Ill. Ann. Stat. ch. 1101/2 para. 41-1 (Supp. 1988)
IN	18	Ind. Code Ann. § 34-1-67-1 (Burns Supp. 1980)
IA	18	Iowa Code Ann. § 599.1 (West 1981)
KS	18	Kan. Stat. Ann. § 38-101 (1986)
KY	18	Ky. Rev. Stat. Ann. § 2.015 (Michie/Bobbs-Merrill 1985)
LA	18	La. Civ. Code Ann. art. 37 (West 1987)
ME	18	Me. Rev. Stat. Ann. tit. 1, § 72 (1979)
MD	18	Md. Ann. Code art. 1, § 24 (1981)
MA	18	Mass. Gen. Laws Ann. ch. 4, § 7 Cl. fifty-first (West 1986)

(a3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
MI	18	Mich. Comp. Laws Ann. § 722.52 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 645.451 (West Supp. 1988)
MS	21	Miss. Code. Ann. § 1-3-27 (1972)
MO	—	Not Uniform
MT	18	Mont. Code Ann. § 411-1-101 (1987)
NE	19	Neb. Rev. Stat. § 38-101 (1984)
NV	18	Nev. Rev. Stat. § 129.010 (1957)
NH	18	N.H. Rev. Stat. Ann. 21:44 (1987)
NJ	18	N.J. Stat. Ann. § 9:17 B-3 (Supp. 1988)
NM	18	N.M. Stat. Ann. § 28-6-1 (1983)
NY	—	Not Uniform
NC	18	N.C. Gen. Stat. § 48A-2 (1984)
ND	18	N.D. Cent. Code § 14-10-01 (1981)
OH	18	Ohio Rev. Code Ann. § 3109.01 (Baldwin 1983)
OK	18	Okla. Stat. Ann. tit. 15, § 13 (West 1983)
OR	18	Or. Rev. Stat. § 109-510 (1985)
PA	21	Pa. Stat. Ann. tit. 1-6, § 1991 (Purdon 1986)
RI	18	R.I. Gen. Laws § 15-12-1 (1981)
SC	18	S.C. Const. art. XVII, § 14 (1984)
SD	18	S.D. Codified Laws Ann. § 26-1-1 (1984)
TN	18	Tenn. Code Ann. § 1-3-105 (Repl. 1985)
TX	18	Tex. Fam. Code Ann. § 11.01(1) (Vernon 1986)

(a4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
UT	18	Utah Code Ann. § 15-2-1 (Repl. 1986)
VT	18	Vt. Stat. Ann. tit. 1, § 173 (Repl. 1986)
VA	18	Va. Code Ann. § 1-13.42 (Repl. 1987)
WA	18	Wash. Rev. Code Ann. § 26.28.010 (1986)
WV	18	W. Va. Code § 2-2-10 (aa) (Repl. 1987)
WI	18	Wis. Stat. Ann. § 990.01(20) (West 1985)
WY	19	Wyo. Stat § 14-1-101 (1986)

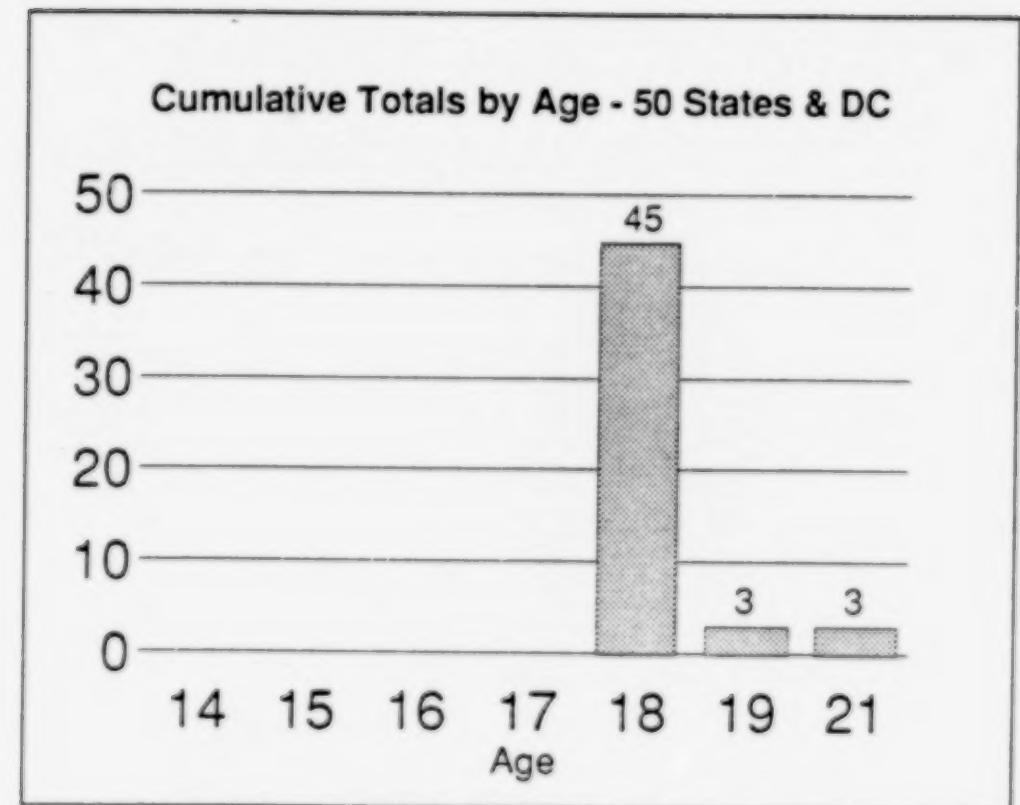
Totals (50 States and D.C.)

<u>Age</u>	<u>18</u>	<u>19</u>	<u>21</u>	<u>Not Uniform</u>
<u>Number</u>	<u>44</u>	<u>3</u>	<u>2</u>	<u>2</u>

(b1)

APPENDIX B

Right to Serve on Jury



(b2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	19	Ala. Code § 12-16-60(a)(1) (Repl. 1986)
AK	18	Alaska Stat. § 09.20.010(a)(3) (Supp. 1987)
AZ	18	Ariz. Rev. Stat. Ann. § 21-301(D) (Supp. 1987)
AR	18	Ark. Stat. Ann. § 16-31-101 (1987)
CA	18	Cal. Civ. Proc. § 198(a)(1) (Supp. 1988)
CO	18	Colo. Rev. Stat. § 13-71-109(2)(a) (Repl. 1987)
CT	18	Conn. Gen. Stat. § 51-217 (Supp. 1988)
DL	18	Del. Code Ann. tit. 10, § 4506(b)(1) (Supp. 1986)
DC	18	D.C. Code Ann. § 11-1906(b)(1)(C) (Supp. 1987)
FL	18	Fla. Stat. Ann. § 40.01 (West Supp. 1988)
GA	18	OCGA § 15-12-40 (Supp. 1987)
HI	18	Haw. Rev. Stat. § 612-4 (Repl. 1985)
ID	18	Idaho Code § 2-209(2)(a) (Supp. 1988)
IL	18	Ill. Ann. Stat. ch. 78, para. 2 (Supp. 1988)
IN	18	Ind. Code Ann. § 33-4-5-2 (Supp. 1988)
IA	18	Iowa Code Ann. § 607(A).4(1)(a) (1988)
KS	18	Kan. Stat. Ann. § 43-156 (1986)
KY	18	Ky. Rev. Stat. Ann. § 29A.080(2)(a) (Supp. 1987)
LA	18	La. Code Crim. Proc. Ann. art. 401(a)(2) (Supp. 1988)

(b3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
ME	18	Me. Rev. Stat. Ann. tit. 14, § 1211 (Supp. 1987)
MD	18	Md. Cts. & Jud. Proc. Code Ann. § 8-104 (Repl. 1984)
MA	18	Mass. Gen. Laws. Ann. ch. 234, § 1 (Supp. 1988), ch. 51, § 1 (West 1975)
MI	18	Mich. Comp. Laws Ann. § 600.1307a(1)(a) (Supp. 1988)
MN	18	Minn. Stat. Ann. § 593.41(2)(2) (1988)
MS	21	Miss. Code Ann. § 13-5-1 (1972)
MO	21	Mo. Ann. Stat. § 494.010 (Supp. 1988)
MT	18	Mont. Code Ann. § 3-15-301 (1987)
NE	19	Neb. Rev. Stat. § 25-1601 (1985)
NV	18	Nev. Rev. Stat. § 6.010 (1986)
NH	18	N.H. Rev. Stat. Ann. §§ 500-A:1 to 500-A:2 (Repl. 1983)
NJ	18	N.J. Stat. Ann. § 9-17B (Supp. 1988)
NM	21	N.M. Stat. Ann. § 38-5-1 (Repl. 1987)
NY	18	N.Y. Judiciary Law § 510(2) (Supp. 1988)
NC	18	N.C. Gen. Stat. § 9-3 (1986)
ND	18	N.D. Cent. Code § 27-09.1-08(2)(b) (Supp. 1987)
OH	18	Ohio Rev. Code Ann. § 2313.42 (Baldwin 1984)
OK	18	Okla. Stat. Ann. tit. 38, § 28 (Supp. 1988)
OR	18	Or. Rev. Stat. § 10.030(2)(c) (1987)
PA	18	Pa. Stat. Ann. tit. 42, § 4521 (Supp. 1988)

(b4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
RI	18	R.I. Gen. Laws § 9-9-1 (1985)
SC	18	S.C. Code Ann. § 14-7-130 (Supp. 1987)
SD	18	S.D. Codified Laws Ann. § 16-13-10 (1987)
TN	18	Tenn. Code Ann. § 22-1-101(1) (Repl. 1980)
TX	18	Tex. Gov't Code Ann. § 62.102 (Vernon 1987)
UT	18	Utah Code Ann. § 78-46-7(1)(b) (Repl. 1987)
VT	18	Vt. Stat. Ann.—Administrative Orders and Rules: Qualification List, Selection and Summoning of All Jurors—Rule 25 (Repl. 1986)
VA	18	Va. Code Ann. § 8.01-337 (Supp. 1988)
WA	18	Wash. Rev. Code Ann. § 2.36.070 (1988)
WV	18	W. Va. Code § 52-1-8(b)(1) (Supp. 1988)
WI	18	Wis. Stat. Ann. § 756.01(1) (1981)
WY	19	Wyo. Stat. § 1-11-101) (1988)

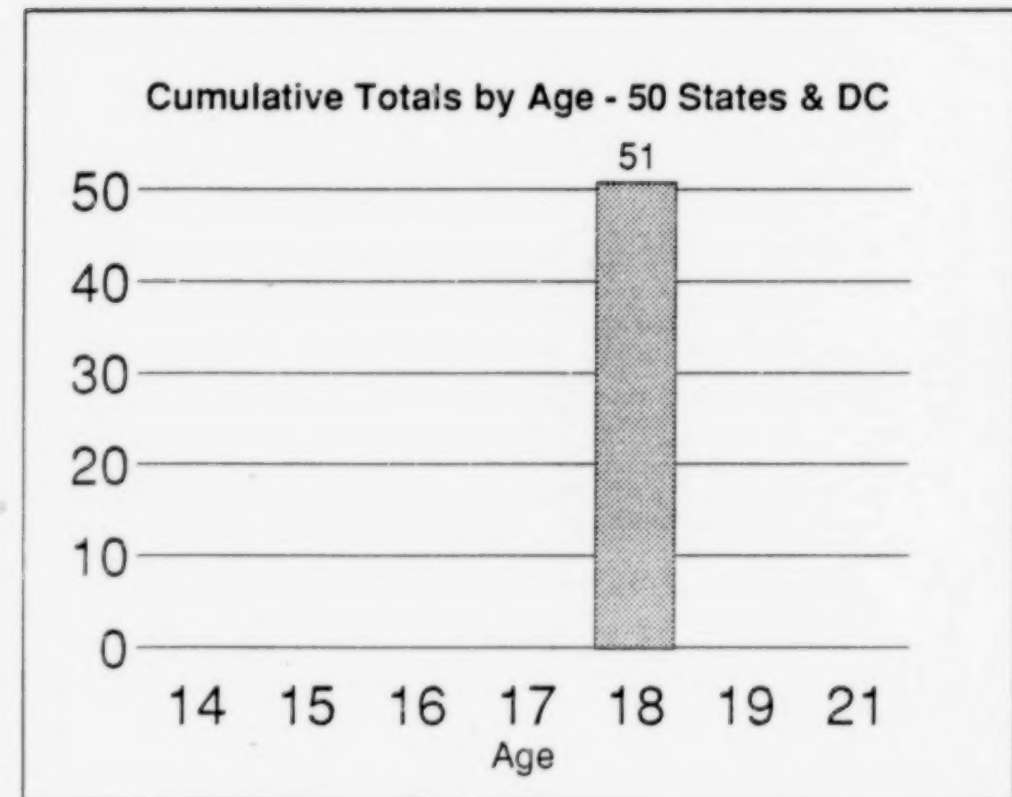
Totals (50 States and D.C.)

<u>Age</u>	<u>18</u>	<u>19</u>	<u>21</u>
<u>Number</u>	<u>45</u>	<u>3</u>	<u>3</u>

(c1)

APPENDIX C

Right to Vote



(c2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	18	[No provisions beyond reference to U.S. Const., Amdt. 26]
AK	18	Alaska Const., Art. V, § 1 (1980)
AZ	18	Ariz. Rev. Stat. § 16-121 (Supp. 1987)
AR	18	Ark. Stat. Ann. § 7-8-401 (1987)
CA	18	Cal. Const., Art. 2, § 2 (1983)
CO	18	Colo. Rev. Stat. § 1-2-101 (Repl. 1980)
CT	18	Conn. Const., Amdt. Art. 9 (1985); Conn. Gen. Stat. § 9-12 (Supp. 1988)
DL	18	Del. Code Ann. tit. 15, § 1701 (Repl. 1981)
DC	18	D.C. Code Ann. § 1-1311(b)(1) (Repl. 1987)
FL	18	Fla. Stat. Ann. § 97.041 (1982)
GA	18	OCGA § 21-2-219 (1986)
HI	18	Haw. Rev. Stat. tit. 2, § 11-12 (Repl. 1985)
ID	18	Idaho Code § 34-402 (Supp. 1988)
IL	18	Ill. Stat. Ann. ch. 46, para. 3-1 (Supp. 1988)
IN	18	Ind. Code Ann. § 3-7-1-1 (Supp. 1987)
IA	18	Iowa Code Ann. § 47-4 (Supp. 1988)
KS	18	Kan. Const., Art. 5, § 1 (1978)
KY	18	Ky. Const. § 145 (Repl. 1979)
LA	18	La. Const., Art. 1, § 10 (1977); La. Rev. Stat. Ann. § 18:101 (1979)
ME	18	Me. Rev. Stat. Ann. tit. 21A, § 111(2) (Supp. 1987)

(c3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
MD	18	Md. Ann. Code art. 33, § 3-4(b)(2) (Repl. 1986)
MA	18	Mass. Gen. Laws Ann. ch. 51, § 1 (Supp. 1988)
MI	18	Mich. Comp. Laws Ann. § 168.492 (Supp. 1988)
MN	18	Minn. Stat. Ann. § 201.014 (Supp. 1988)
MS	18	Miss. Const., Art. 12, § 241 (Supp. 1987)
MO	18	Mo. Const., Art. VIII, § 2 (Supp. 1988)
MT	18	Mont. Const., Art. IV, § 2 (1987); Mont. Code Ann. § 13-1-11 (1987)
NE	18	Neb. Const., Art. 6, § 1 (1986-1987); Neb. Rev. Stat. § 32-223 (1984)
NV	18	Nev. Rev. Stat. § 293.485 (Supp. 1987)
NH	18	N.H. Const., Pt. 1, Art. 11 (Supp. 1987)
NJ	18	N.J. Const., Art. 2, para. 3 (Supp. 1988)
NM	18	[No provisions beyond reference to U.S. Const., Amdt. 26]
NY	18	N.Y. Elec. Law § 5-102 (1978)
NC	18	N.C. Gen. Stat. § 163-55 (1987)
ND	18	N.D. Const., Art. II, § 1 (Repl. 1981)
OH	18	Ohio Const., Art. V, § 1 (1979); Ohio Rev. Code Ann. §§ 3503.01 & 3503.11 (1982)
OK	18	Okla. Const., Art. III, § 1 (1981)
OR	18	Or. Const., Art. II, § 2 (1987)

(c4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
PA	18	Pa. Stat. Ann. tit. 25, § 2811 (1988)
RI	18	R.I. Gen. Laws § 17-1-3 (Supp. 1987)
SC	18	S.C. Code Ann. § 7-5-610 (Supp. 1987)
SD	18	S.D. Const., Art. VII, § 2 (1978); S.D. Codified Laws Ann. § 12-3-1 (1982)
TN	18	Tenn. Code Ann. § 2-2-102 (Repl. 1985)
TX	18	Tex. Elec. Code Ann. § 11.002 (Supp. 1988)
UT	18	Utah Code Ann. § 20-1-17 (Repl. 1984)
VT	18	Vt. Stat. Ann. tit. 17, § 2121 (1982)
VA	18	Va. Const. Art. II, § 1 (Repl. 1987)
WA	18	Wash. Const. Art. VI, § 1, Amdt. 63 (Supp. 1988)
WV	18	W. Va. Code § 3-1-3 (Repl. 1987)
WI	18	Wis. Const., Art. 3, § 1 (Supp. 1987); Wis. Stat. Ann. §§ 6.02 & 6.05 (1986)
WY	18	Wyo. Stat. § 22-1-102(k) (Supp. 1987)

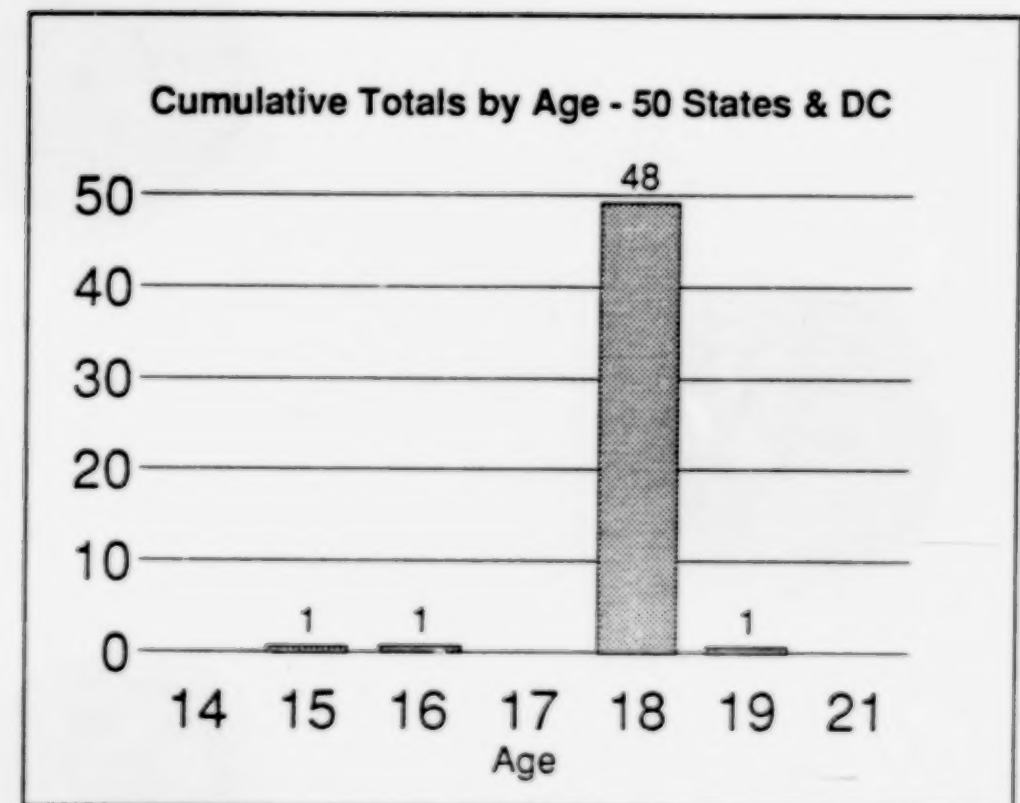
Totals (50 States and D.C.)

Age 18
Number 51

(d1)

APPENDIX D

Right to Marry Without Parental Consent



(d2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	18	Ala. Code § 30-1-5 (Repl. 1983)
AK	18	Alaska Stat. § 25.05.171 (1983) (judge may permit minor to marry without parental consent, even in the face of parental opposition, in certain circumstances)
AZ	18	Ariz. Rev. Stat. Ann. § 25-102(A) (1976)
AR	18	Ark. Stat. Ann. § 9-11-102 through 9-11-105 (1987)
CA	18	Cal. Civ. Code § 4101 (1983)
CO	18	Colo. Rev. Stat. § 14-2-106(1)(a)(I) (Repl. 1987)
CT	18	Conn. Gen. Stat. § 46b-30 (1986)
DL	18	Del. Code Ann. tit. 13, § 123 (Repl. 1981)
DC	18	D.C. Code Ann. § 30-111 (1981)
FL	18	Fla. Stat. Ann. § 741.04 (1986)
GA	18	OCGA § 19-3-37 (1982)
HI	18	Haw. Rev. Stat. § 572-2 (Repl. 1985)
ID	18	Idaho Code § 32-202 (1988)
IL	18	Ill. Ann. Stat. ch. 40, para. 203(1) (Supp. 1988)
IN	18	Ind. Code Ann. § 31-7-1-6 (Burns Supp. 1988)
IA	18	Iowa Code Ann. § 595.2 (1981 & Supp. 1988)
KS	18	Kan. Stat. Ann. § 23-106 (1981)

(d3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
KY	18	Ky. Rev. Stat. Ann. § 402.210 (Michie/Bobbs-Merrill 1984)
LA	18	La. Civ. Code Ann. art. 87 (Supp. 1988) (minors not legally prohibited from marrying, even without parental consent, but marriage ceremony required); La. Rev. Stat. Ann. § 9:21 (Supp. 1988) (official may not perform marriage ceremony in which a minor is a party without parental consent; Comments to Civ. Code Ann. art. 87 suggest that such a marriage is valid but that official may face sanctions)
ME	18	Me. Rev. Stat. Ann. tit. 19, § 62 (Supp. 1987)
MD	16	Md. Fam. Law Code Ann. § 2-301 (Supp. 1987)
MA	18	Mass. Gen. Laws. Ann. Ch. 207 § 7 (1988)
MI	18	Mich. Comp. Laws Ann. § 551.103 (1988)
MN	18	Minn. Stat. Ann. § 517.02 (Supp. 1988)
MS	15	Miss. Code Ann. § 93-1-5(d) (Supp. 1987) (female may marry at 15 without parental consent)
MO	18	Mo. Ann. Stat. § 451.090 (Vernon 1986)
MT	18	Mont. Code Ann. § 40-1-202 (1987)
NE	19	Neb. Rev. Stat. § 42-105 (1984)
NV	18	Nev. Rev. Stat. § 122.020 (1986)
NH	18	N.H. Rev. Stat. Ann. § 457:5 (1983)
NJ	18	N.J. Stat. Ann. § 9:17 B-1 (Supp. 1988)
NM	18	N.M. Stat. Ann. § 40-1-6 (Repl. 1986)

(d4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
NY	18	N.Y. Domestic Relations Law § 15 (1988)
NC	18	N.C. Gen. Stat. § 51-2 (Supp. 1987)
ND	18	N.D. Cent. Code § 14-03-02 (1981)
OH	18	Ohio Rev. Code Ann. § 3101.01 (Supp. 1987)
OK	18	Okla. Stat. Ann. tit. 43, § 3 (West 1979)
OR	18	Or. Rev. Stat. § 106.060 (1987)
PA	18	Pa. Stat. Ann. tit. 48, § 1-5 (Purdon Supp. 1988)
RI	18	R.I. Gen. Laws § 15-2-11 (1981)
SC	18	S.C. Code Ann. § 20-1-250 (1985)
SD	18	S.D. Codified Laws Ann. § 25-1-9 (1984)
TN	18	Tenn. Code Ann. § 36-3-106 (Supp. 1987)
TX	18	Tex. Fam. Code Ann. § 1.51 (Supp. 1988)
UT	18	Utah Code Ann. § 30-1-9 (Repl. 1984)
VT	18	Vt. Stat. Ann. tit. 18, § 5142 (Repl. 1987)
VA	18	Va. Code Ann. § 20-48 (Repl. 1983)
WA	18	Wash. Rev. Code Ann. § 26.04.210 (1986)
WV	18	W. Va. Code § 48-1-1 (Repl. 1986)
WI	18	Wis. Stat. Ann. § 765.02(2) (Supp. 1987)

(d5)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
WY	18	Wyo., Stat. § 20-1-102(c) (1987)

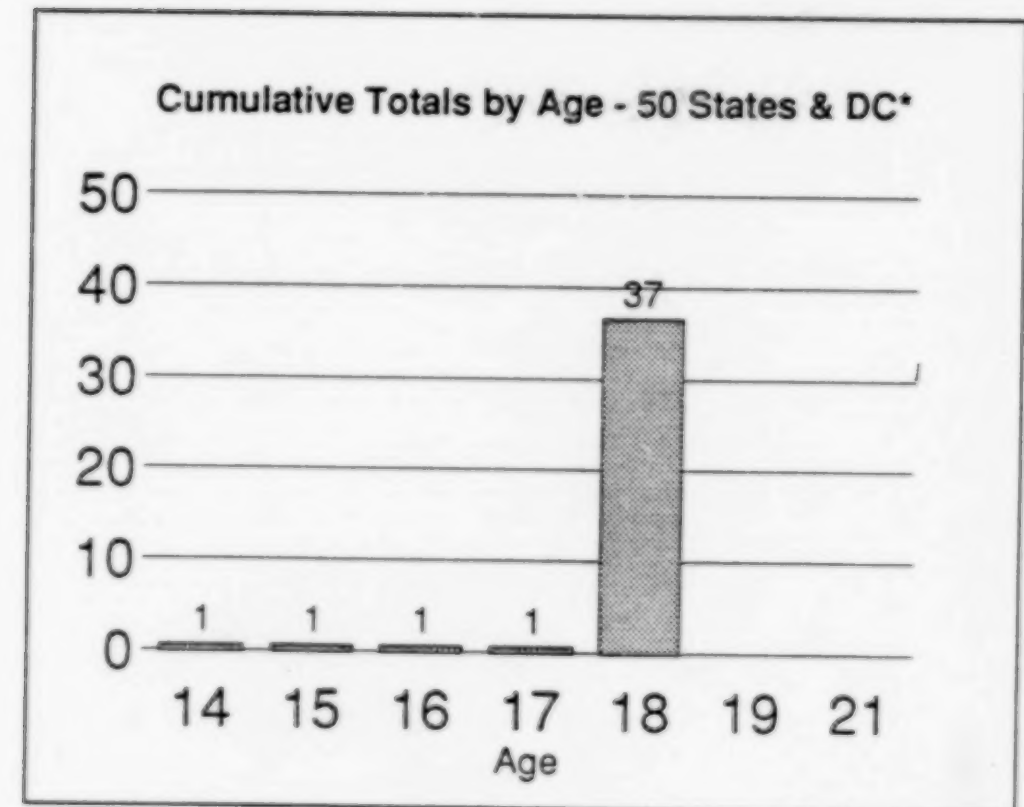
Totals (50 States and D.C.)

<u>Age</u>	<u>15</u>	<u>16</u>	<u>18</u>	<u>19</u>
<u>Number</u>	<u>1</u>	<u>1</u>	<u>48</u>	<u>1</u>

(e1)

APPENDIX E

Consent to Most Forms of Medical Treatment



*Eight states have no relevant legislation (DC, MI, NE, NH, VT, WV, WI, and WY), and two states (AR and MS) permit consent if the minor is able to understand the decision.

(e2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	14	Ala. Code § 22-8-4 (Repl. 1984)
AK	18	Alaska Stat. § 09.65.100 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 44-132 (1967)
AR	minor able to understand	Ark. Stat. Ann. § 20-9-602 (1987)
CA	18	Cal. Civ. Code § 25.8 (West 1982)
CO	18	Colo. Rev. Stat. § 13-22-103 (Supp. 1986)
CT	18	Conn. Gen. Stat. Ann. §§ 46b-150d (1986)
DL	18	Del. Code Ann. tit. 13, § 707 (1981)
DC	—	No Legislation
FL	18	Fla. Stat. Ann. § 743.064 (West 1986)
GA	18	OCGA § 31-9-2 (1985)
HI	17	Haw. Rev. Stat. § 577A-2 (1976)
ID	18	Idaho Code § 39-3801 (1985)
IL	18	Ill. Ann. Stat. ch. 111, para. 4501 (Smith-Hurd 1978)
IN	18	Ind. Code Ann. § 16-8-3-1 (Burns 1973)
IA	18	Iowa Code Ann. § 147.137 (Supp. 1988)
KS	18	Kan. Stat. Ann. § 38-122 (1986)
KY	18	Ky. Rev. Stat. Ann. § 216B.400 (Michie/Bobbs-Merrill 1982)
LA	18	La. Rev. Stat. Ann. 40, § 40:1095 (West 1977)
ME	18	Me. Rev. Stat. Ann. tit. 32, § 3292 (Supp. 1986)
MD	18	Md. Health-Gen. Code Ann. § 20-102 (1982)

(e3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
MA	18	Mass. Gen. Laws. Ann. ch. 112 § 12F (West 1983)
MI	—	No Legislation
MN	18	Minn. Stat. Ann. § 144.341 (West 1987)
MS	minor able to understand	Miss. Code Ann. § 41-41-3 (Supp. 1986)
MO	18	Mo. Ann. Stat. § 431.061 (Vernon Supp. 1988)
MT	18	Mont. Code Ann. § 41-1-402 (1987)
NE	—	No Legislation
NV	18	Nev. Rev. Stat. § 129.030 (1957)
NH	—	No Legislation
NJ	18	N.J. Stat. Ann. § 9:17B-1 (West Supp. 1987)
NM	18	N.M. Stat. Ann. § 24-10-1 (1986)
NY	18	N.Y. Pub. Health Law § 2504 (McKinney 1985)
NC	18	N.C. Gen. Stat. § 90-21.1 (1985)
ND	18	N.D. Cent. Code § 14-10-17.1 (1981)
OH	18	Ohio Rev. Code Ann. § 2317.54 (Supp. 1987)
OK	18	Okla. Stat. Ann. tit. 63, § 2602 (West 1984)
OR	15	Or. Rev. Stat. § 109.640 (1985)
PA	18	Pa. Stat. Ann. tit. 35 § 10101 (Purdon 1977)
RI	16	R.I. Gen. Laws § 23-4.6-1 (1985)
SC	18	S.C. Code Ann. § 20-7-280 (Law. Co-op. 1985)

(e4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
SD	18	S.D. Codified Laws Ann. § 20-9-4.2 (Supp. 1986)
TN	18	Tenn. Code Ann. §§ 63-6-220, 63-6-222, 63-6-223 (Repl. 1986)
TX	18	Tex. Fam. Code Ann. § 35.03 (1986)
UT	18	Utah Code Ann. § 78-14-5(4)(e) (Repl. 1977)
VT	—	No Legislation
VA	18	Va. Code Ann. § 54-325.2 (Supp. 1987)
WA	18	Wash. Rev. Code Ann. § 26.28.015(5) (1986)
WV	—	No Legislation
WI	—	No Legislation
WY	—	No Legislation

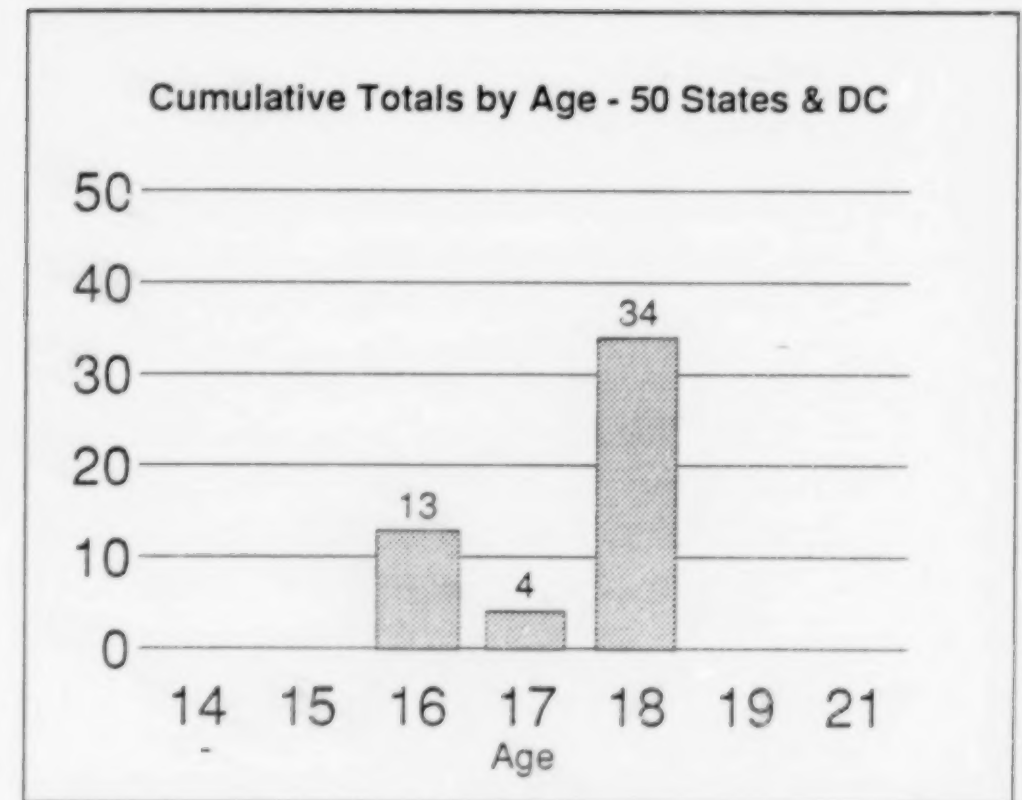
Totals (50 States and D.C.)

<u>Age</u>	<u>14</u>	<u>15</u>	<u>16</u>	<u>17</u>	<u>18</u>	<u>minor able</u>	<u>No</u>
<u>Number</u>	<u>1</u>	<u>1</u>	<u>1</u>	<u>1</u>	<u>37</u>	<u>to understand</u>	<u>Legislation</u>
						<u>2</u>	<u>8</u>

(f1)

APPENDIX F

Right to Drive Without Parental Consent



(f2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	16	Ala. Code § 32-6-7(1) (Repl. 1983)
AK	18	Alaska Stat. § 28.15.071 (Supp. 1987)
AZ	18	Ariz. Rev. Stat. Ann. §§ 28-413(A)(1) (Supp. 1987)
AR	18	Ark. Stat. Ann. 27-16-702(a)(1), (c)(3) (Supp. 1987)
CA	16	Cal. Veh. Code § 12507 (1987)
CO	18	Colo. Rev. Stat. § 42-2-107(1) (Repl. 1984)
CT	18	Conn. Gen. Stat. § 14-36 (1987)
DL	16	Del. Code Ann. tit. 21, § 2707 (Repl. 1985)
DC	16	D.C. Code Ann. § 40-301 (1981)
FL	18	Fla. Stat. Ann. § 322.09 (1988)
GA	18	OCGA § 40-5-26 (1985)
HI	18	Haw. Rev. Stat. § 286-112 (Rep. 1985)
ID	18	Idaho Code § 49-313 (Supp. 1987)
IL	18	Ill. Ann. Stat. ch. 95-1/2, para. 6-103 (Supp. 1988)
IN	18	Ind. Code Ann. § 9-1-4-32 (Repl. 1987)
IA	16	Iowa Code Ann. § 321.177 (1985 & Supp. 1988)
KS	16	Kan. Stat. Ann. § 8-237 (1982)
KY	18	Ky. Rev. Stat. Ann. § 186.470 (Michie/Bobbs-Merrill Supp. 1986)
LA	18	La. Rev. Stat. Ann. § 32:407 (Supp. 1988)
ME	18	Me. Rev. Stat. Ann. tit. 29, § 585 (Supp. 1987)

(f3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
MD	16	Md. Transp. Code Ann. § 16-103 (Repl. 1987)
MA	18	Mass. Gen. Laws. Ann. ch. 90, § 8 (1985 & Supp. 1988)
MI	18	Mich. Comp. Laws Ann. § 257-308 (Supp. 1988)
MN	18	Minn. Stat. Ann. § 171.04 (1986)
MS	17	Miss. Code Ann. § 63-1-23 (Supp. 1987)
MO	16	Mo. Ann. Stat. § 302.060 (Supp. 1988)
MT	16	Mont. Code Ann. § 61-5-105 (1985) (15-year-olds may drive without parental consent if they pass a driver's education course)
NE	16	Neb. Rev. Stat. § 60-407 (1984)
NV	16	Nev. Rev. Stat. § 483.250 (1986)
NH	18	N.H. Rev. Stat. Ann. § 263:17 (Supp. 1987)
NJ	17	N.J. Stat. Ann. § 39:3-10 (Supp. 1988)
NM	18	N.M. Stat. Ann. § 66-5-11 (Repl. 1984)
NY	18	N.Y. Veh. & Traf. Law § 502 (1986)
NC	18	N.C. Gen. Stat. § 20-11 (1983)
ND	18	N.D. Cent. Code § 39-06-08 (Repl. 1987)
OH	18	Ohio Rev. Code Ann. § 4507.07 (Supp. 1987)
OK	16	Okla. Stat. Ann. tit. 47, § 6-107 (1988)
OR	18	Or. Rev. Stat. § 807.060 (1987)
PA	17	Pa. Stat. Ann. tit. 75, § 1503 (Purdon 1977)

(f4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
RI	16	R.I. Gen. Laws § 31-10-3 (Supp. 1987)
SC	18	S.C. Code Ann. § 56-1-100 (1976)
SD	18	S.D. Codified Laws Ann. § 32-12-6 (1984)
TN	18	Tenn. Code Ann. § 55-7-104(c)(1) (Supp. 1987)
TX	17	Tex. Rev. Civ. Stat. Ann. art. 6687(b)(4) (Supp. 1988)
UT	18	Utah Code Ann. § 41-2-115(1) (Supp. 1987)
VT	18	Vt. Stat. Ann. tit. 23, § 607 (Repl. 1987)
VA	18	Va. Code Ann. § 46.1-357 (Supp. 1988)
WA	18	Wash. Rev. Code Ann. § 46.20.100 (1987)
WV	18	W.Va. Code § 17B-2-3 (Repl. 1986)
WI	18	Wis. Stat. Ann. § 343.15 (Supp. 1987)
WY	18	Wyo. Stat. § 31-7-112 (Supp. 1988)

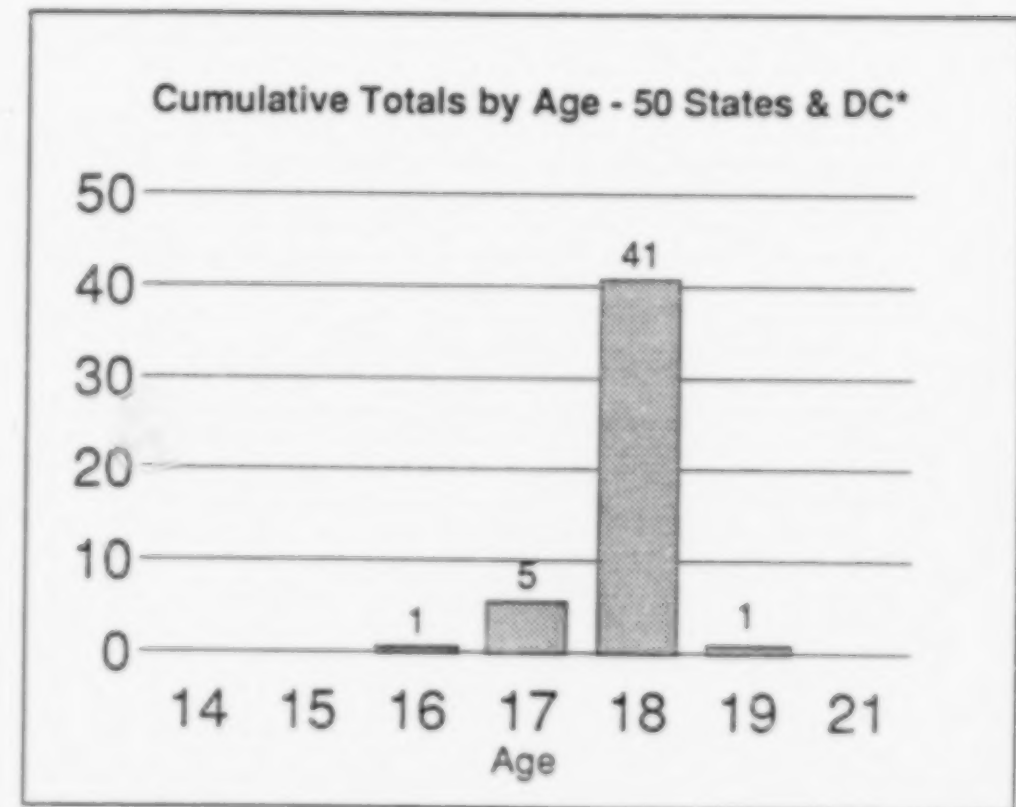
Totals (50 States and D.C.)

<u>Age</u>	<u>16</u>	<u>17</u>	<u>18</u>
<u>Number</u>	<u>13</u>	<u>4</u>	<u>34</u>

(g1)

APPENDIX G

Right to Purchase Pornographic Materials



*One state (AK) has no legislation, one state (OK) outlaws obscenity by statute, and one state (WY) does not specify a minimum age.

(g2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	18	Ala. Code § 13A-12-170(1) (Supp. 1987)
AK	—	No Legislation
AZ	18	Ariz. Rev. Stat. Ann. § 13-3506 (Supp. 1987)
AR	17	Ark. Stat. Ann. §§ 5-68-502, 5-68-501(1) (1987)
CA	18	Cal. Penal Code § 313.1 (Supp. 1988)
CO	18	Colo. Rev. Stat. §§ 18-7-501 to 18-7-502 (Repl. 1986)
CT	18	Conn. Gen. Stat. § 53a-196 (1985)
DL	18	Del. Code Ann. tit. 11, § 1361(b) (Repl. 1987)
DC	17	D.C. Code Ann. § 22-2001(b) (1981)
FL	18	Fla. Stat. Ann. § 847.012 (West Supp. 1987)
GA	18	OCGA § 16-12-103 (1984)
HA	18	Haw. Rev. Stat. § 712-1215 (Repl. 1985)
ID	18	Idaho Code § 18-1513 (1987)
IL	18	Ill. Ann. Stat. ch. 38, para. 11-21 (Smith-Hurd 1979)
IN	18	Ind. Code Ann. § 35-30-11.1-1 (Burns 1979)
IW	18	Iowa Code Ann. § 728.2 (West 1979)
KS	18	Kan. Stat. Ann. § 21-4301a (Supp. 1987)
KY	18	Ky. Rev. Stat. Ann. § 531-030 (Michie-Bobbs-Merrill 1985)
LA	17	La. Rev. Stat. Ann. § 14:91.11 (West 1986)

(g3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
ME	18	Me. Rev. Stat. Ann. tit. 17, § 2911 (1983 & Supp. 1987)
MD	18	Md. Ann. Code art. 27, § 419 (Supp. 1987)
MA	18	Mass. Gen. Laws Ann. ch. 272, § 28 (Supp. 1988)
MI	18	Mich. Comp. Laws Ann. § 750.142 (Supp. 1988)
MN	18	Minn. Stat. Ann. § 617.293 (1987)
MS	18	Miss. Code Ann. § 97-5-27 (Supp. 1987)
MO	18	Mo. Ann. Stat. § 753.040 (Vernon 1979)
MT	18	Mont. Code Ann. § 45-8-201 (1987)
NE	19	Neb. Rev. Stat. § 28-808 (1985)
NV	18	Nev. Rev. Stat. Ann. § 201.265 (1986)
NH	18	N.H. Rev. Stat. Ann. § 571-B:2 (Repl. 1986)
NJ	18	N.J. Stat. Ann. §§ 2C:34-2(b) (Supp. 1988), 2C:34-3(b) (1982)
NM	18	N.M. Stat. Ann. §§ 30-37-1 to 30-37-2 (1984)
NY	18	N.Y. Penal Law § 235.21 (McKinney 1980)
NC	18	N.C. Gen. Stat. § 19-13 (1983)
ND	18	N.D. Cent. Code § 12.1-27.1-03 (Repl. 1985)
OH	18	Ohio Rev. Code Ann. § 2907.31 (Baldwin 1986)
OK	—	Okla. Stat. Ann. tit. 21, § 1040.8 (West Supp. 1988) (obscenity illegal)
OR	18	Or. Rev. Stat. §§ 167.060, <i>et. seq.</i> (1987)

(g4)

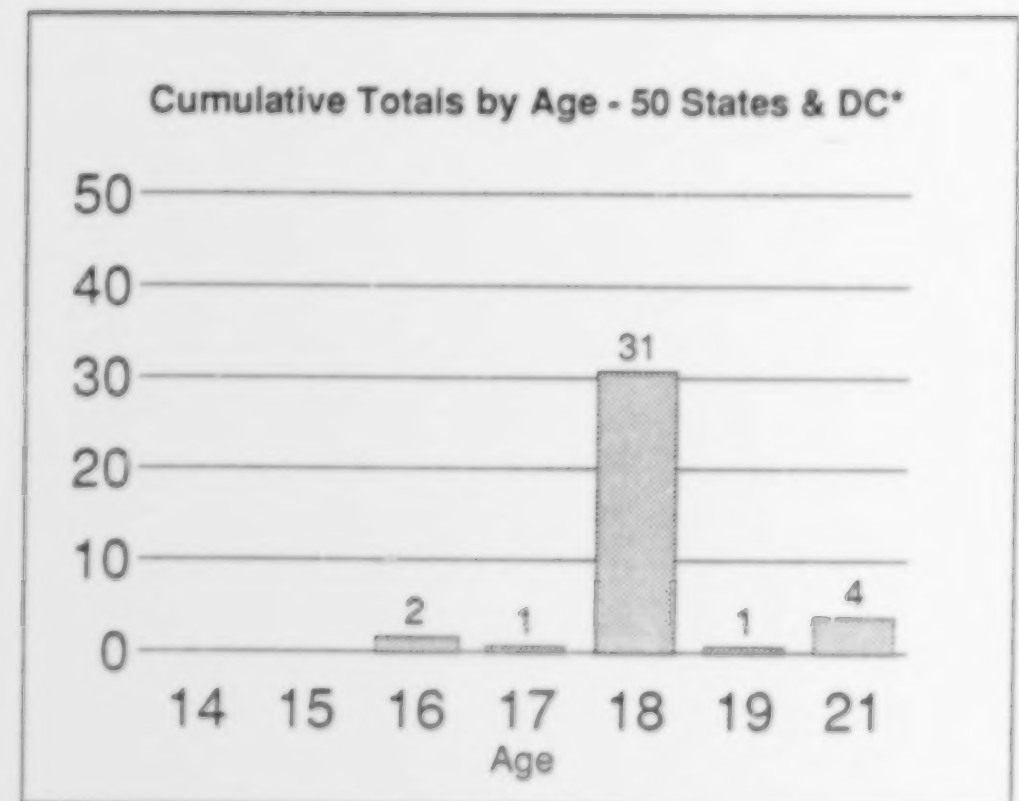
<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
PA	17	Pa. Stat. Ann. tit. 18, § 5903 (Purdon 1983)
RI	18	R.I. Gen. Laws § 11-31-10 (Supp. 1987)
SC	16	S.C. Code Ann. § 16-15-385 (Supp. 1987)
SD	18	S.D. Codified Laws Ann. § 22-24-28 (1988)
TN	18	Tenn. Code Ann. § 39-6-1132 (Repl. 1982)
TX	17	Tex. Penal Code Ann. § 43.24 (Vernon 1974)
UT	18	Utah Code Ann. § 76-10-1206(1) (Repl. 1978)
VT	18	Vt. Stat. Ann. tit. 13, §§ 2801 to 2802 (Repl. 1974)
VA	18	Va. Code Ann. § 18.2-391 (Repl. 1988)
WA	18	Wash. Rev. Code Ann. §§ 9.68.050(1) to 9.68.060 (Supp. 1988)
WV	18	W. Va. Code §§ 61-8A-1(6) to 61-8A-2 (Repl. 1984)
WI	18	Wis. Stat. Ann. § 944.21(2) (1982)
WY	—	Wyo. Stat. § 6-4-302 (1983) and § 8-1-102 (1986) (no age specified)

Totals (50 States and D.C.)

<u>Age</u>	<u>16</u>	<u>17</u>	<u>18</u>	<u>19</u>	<u>Obscenity Illegal</u>	<u>No Legislation</u>	<u>No Age specified</u>
<u>Number</u>	<u>1</u>	<u>5</u>	<u>41</u>	<u>1</u>	<u>1</u>	<u>1</u>	<u>1</u>

(h1)

APPENDIX H

Right to Participate in
Legalized Gambling

*Twelve states (AL, AR, ID, IN, KY, MN, NM, NC, SC, SD, VT and VA) do not permit gambling.

(h2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	—	Gambling Not Permitted by Statute
AK	18	Alaska Stat. § 43.35.040(a)(1) (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 5-112 (1983)
AR	—	Gambling Not Permitted by Statute
CA	18	Cal. Penal Code § 326.5(c) (West Supp. 1988)
CO	18	Colo. Rev. Stat. § 24-35-214(1)(c) (Repl. 1982)
CT	18	Conn. Gen. Stat. § 7-186a (Supp. 1988)
DL	18	Del. Code Ann. tit. 29, § 4810 (Repl. 1983)
DC	18	D.C. Code Ann. § 2-2534 (Supp. 1987)
FL	21	Fla. Stat. Ann. § 849.093(9)(a) (Supp. 1988)
GA	18	OCGA § 16-12-58 (1984)
HI	18	Haw. Rev. Stat. § 712-1231 (Repl. 1985)
ID	—	Gambling Not Permitted by Statute
IL	18	Ill. Ann. Stat. ch. 120, para. 1102(a) (Smith-Hurd Supp. 1986)
IN	—	Gambling Not Permitted by Statute
IA	18	Iowa Code Ann. § 233.1(C) (Supp. 1988)
KS	18	Kan. Stat. Ann. § 79-4706(m) (1984)
KY	—	Gambling Not Permitted by Statute
LA	17	La. Rev. Stat. Ann. § 14:92(A)(4) (West 1986)
ME	16	Me. Rev. Stat. Ann. tit. 17, § 319 (1983)
MD	18	Md. Ann. Code art. 9, § 124 (1984)

(h3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
MA	18	Mass. Gen. Laws Ann. ch. 128A, § 10 (1981)
MI	18	Mich. Comp. Laws Ann. § 432.110(a) (Supp. 1988)
MN	—	Gambling Not Permitted by Statute
MS	21	Miss. Code Ann. § 97-33-21 (1972)
MO	18	Mo. Ann. Stat. § 313.280 (Supp. 1988)
MT	18	Mont. Code Ann. § 23-5-506 (1987)
NE	18	Neb. Rev. Stat. § 9-250 (1987)
NV	21	Nev. Rev. Stat. § 463.350 (1986)
NH	18	N.H. Rev. Stat. Ann. 287-E:7(III) (bingo); <i>id.</i> at § 287-E:21(v) (lottery); <i>but see id.</i> at § 287-A:4 (raffle tickets) (age 16) (Supp. 1987)
NJ	18	N.J. Stat. Ann. § 9:17B-1 (Supp. 1988)
NM	—	Gambling Not Permitted by Statute
NY	18	N.Y. Tax Law § 1610 (1987)
NC	—	Gambling Not Permitted by Statute
ND	21	N.D. Cent. Code § 53-06.1-07.1 (Supp. 1987)
OH	18	Ohio Rev. Code Ann. § 3770.07 (Supp. 1987)
OK	18	Okla. Stat. Ann. tit. 21, § 995.13 (West 1983) (permitted with parental consent)
OR	18	Or. Rev. Stat. § 163.575(1)(C) (1985)
PA	18	Pa. Stat. Ann. tit. 10, § 305 (Purdon Supp. 1988) (permitted with parental consent)

(h4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
RI	18	R.I. Gen. Laws § 11-19-32 (Supp. 1987)
SC	—	Gambling Not Permitted by Statute
SD	—	Gambling Not Permitted by Statute
TN	16	Tenn. Code Ann. § 39-6-609(f) (Supp. 1987)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 179d, § 17 (Vernon Supp. 1988) (permitted with parental consent)
UT	—	Gambling Not Permitted by Statute
VT	18	Vt. Stat. Ann. tit. 31, § 674(J) (Repl. 1986)
VA	—	Gambling Not Permitted by Statute
WA	18	Wash. Rev. Code Ann. § 67.70.120 (Supp. 1988)
WV	18	W. Va. Code § 19-23-9(e) (Supp. 1988)
WI	18	Wis. Stat. Ann. § 163.51(13) (1974)
WY	19	Wyo. Stat. § 11-25-109(C) (Supp. 1988)

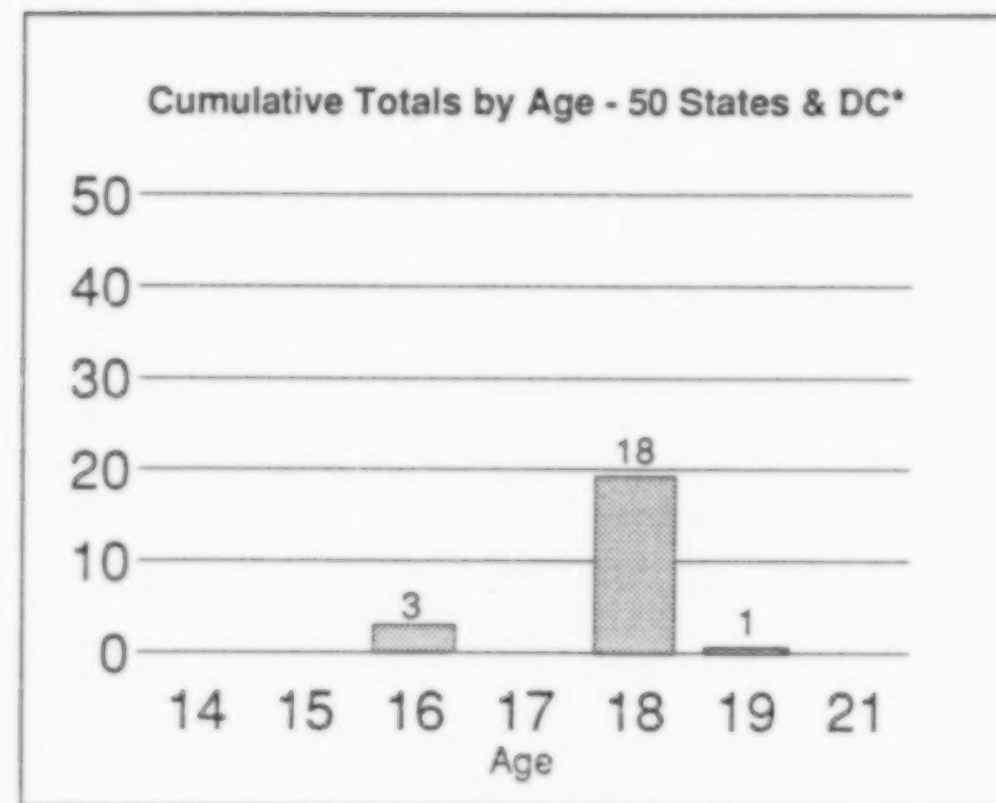
Totals (50 States and D.C.)

<u>Age</u>	<u>16</u>	<u>17</u>	<u>18</u>	<u>19</u>	<u>21</u>	<u>Gambling banned</u>
<u>Number</u>	<u>2</u>	<u>1</u>	<u>31</u>	<u>1</u>	<u>4</u>	<u>12</u>

(i1)

APPENDIX I

Right to Patronize Pool Halls



*Twenty-nine states (AK, AZ, CA, CO, DL, DC, ID, IA, IL, IN, KS, MD, MI, MN, MT, NE, NV, NH, NJ, NM, ND, OH, OR, SD, TX, UT, VT, WV and WI have no relevant legislation.

(i2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	19	Ala. Code § 34-6-9 (Repl. 1985)
AK	—	No Legislation
AZ	—	No Legislation
AR	18	Ark. Stat. Ann. § 5-27-224(a) (1987)
CA	—	No Legislation
CO	—	No Legislation
CT	18	Conn. Gen. Stat. § 53-281 (1985)
DE	—	No Legislation
DC	—	No Legislation
FL	18	Fla. Stat. Ann. § 849.04 (West 1976) (minors may not play where betting allowed)
GA	18	OCGA § 43-8-10 (1984) (minors may not enter if alcohol sold unless accompanied by parent)
HI	18	Haw. Rev. Stat. § 445-54 (1985)
ID	—	No Legislation
IL	—	No Legislation
IN	—	No Legislation
IA	—	No Legislation
KS	—	No Legislation
KY	18	Ky. Rev. Stat. Ann. § 436.320 (Michie/ Bobbs-Merrill 1985)
LA	18	La. Rev. Stat. Ann. § 26:88 (West Supp. 1986)
ME	16	Me. Rev. Stat. Ann. tit. 26, § 773 (1974)
MD	—	No Legislation

(i3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
MA	18	Mass. Gen Laws. Ann. ch. 140, § 179 (West 1974)
MI	—	No Legislation
MN	—	No Legislation
MS	18	Miss. Code Ann. § 97-5-11 (Supp. 1987)
MO	16	Mo. Ann. Stat. § 318.090 (Supp. 1988)
MT	—	No Legislation
NE	—	No Legislation
NV	—	No Legislation
NH	—	No Legislation
NJ	—	No Legislation
NM	—	No Legislation
NY	16	N.Y. Gen. Bus. Law § 465 (McKinney 1984)
NC	18	N.C. Gen. Stat. § 14-317 (1986) (minors may not enter premises where alcohol sold)
ND	—	No Legislation
OH	—	No Legislation
OK	18	Okla. Stat. Ann. tit. 21, § 1103 (West Supp. 1983)
OR	—	No Legislation
PA	18	Pa. Stat. Ann. tit. 18, § 7105 (Purdon 1983)
RI	18	R.I. Gen. Laws § 5-2-13 (1976)
SC	18	S.C. Code Ann. § 20-7-350 (1985)
SD	—	No Legislation

(i4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
TN	18	Tenn. Code Ann. § 39-4-419 (Supp. 1987)
TX	—	No Legislation
UT	—	No Legislation
VT	—	No Legislation
VA	18	Va. Code Ann. § 40.1-100 (1986)
WA	18	Wash. Rev. Code Ann. § 26.28.080(2) (Supp. 1988)
WV	—	No Legislation
WI	—	No Legislation
WY	18	Wyo. Stat. § 33-6-108(b) (1987)

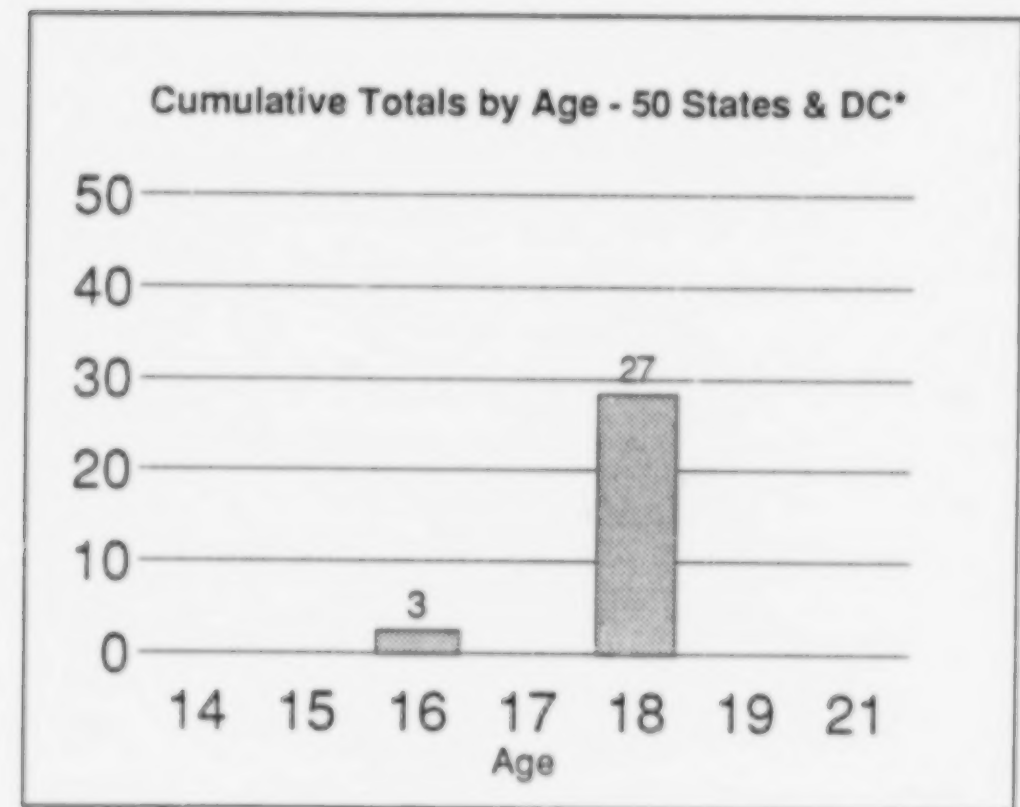
Totals (50 States and D.C.)

<u>Age</u>	<u>16</u>	<u>18</u>	<u>19</u>	<u>No Legislation</u>
<u>Number</u>	<u>3</u>	<u>18</u>	<u>1</u>	<u>29</u>

(j1).

APPENDIX J

Right to Pawn Property or to Sell to Junk or Precious Metal Dealers



*Twenty states (AL, AK, AR, DC, FL, GA, ID, IA, MA, ME, MS, NE, NY, NC, SC, SD, UT, VA, WV, and WY) have no relevant legislation.

(j2)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
AL	—	No Relevant Legislation
AK	—	No Relevant Legislation
AZ	16	Ariz. Rev. Stat. Ann. § 44-1627 (Supp. 1986)
AR	—	No Relevant Legislation
CA	16	Cal. Fin. Code § 21207 (West 1981)
CO	18	Colo. Rev. Stat. § 12-56-104 (1985)
CT	18	Conn. Gen. Stat. § 21-47 (1985)
DL	18	Del. Code Ann. tit. 24, § 2312 (1981)
DC	—	No Relevant Legislation
FL	—	No Relevant Legislation
GA	—	No Relevant Legislation
HI	18	Haw. Rev. Stat. § 445-133 (1985)
ID	—	No Relevant Legislation
IL	18	Ill. Ann. Stat. ch. 23, para. 2366 (Smith-Hurd 1968)
IN	18	Ind. Code Ann. § 28-7-5-36 (Burns 1973)
IA	—	No Relevant Legislation
KS	18	Kan. Stat. Ann. § 18-717 (1981)
KY	18	Ky. Rev. Stat. Ann. § 226.030 (Michie/Bobbs-Merrill 1982)
LA	18	La. Rev. Stat. Ann. § 37:1764 (West Supp. 1987)
ME	18	No Relevant Legislation
MD	18	Md. Ann. Code art. 56, § 424 (1983)

(j3)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
MA	—	No Relevant Legislation
MI	18	Mich. Comp. Laws Ann. § 750.137 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 609.81 (West Supp. 1987)
MS	—	No Relevant Legislation
MO	18	Mo. Ann. Stat. § 568.070 (Vernon 1979)
MT	18	Mont. Code Ann. § 45-5-623 (1987)
NE	—	No Relevant Legislation
NV	18	Nev. Rev. Stat. § 647.140 (1985)
NH	18	N.H. Rev. Stat. Ann. § 398:2 (1983)
NJ	16	N.J. Stat. Ann. § 45:22-31 (West 1978)
NM	18	N.M. Stat. Ann. § 56-12-14 (1986)
NY	—	No Relevant Legislation
NC	—	No Relevant Legislation
ND	—	No Relevant Legislation
OH	18	Ohio Rev. Code Ann. § 4727.10 (Supp. 1987)
OK	18	Okla. Stat. Ann. tit. 59, § 1511 (West Supp. 1987)
OR	18	Or. Rev. Stat. § 726.270 (1985)
PA	18	Pa. Stat. Ann. tit. 63, § 281-29 (Purdon Supp. 1987)
RI	18	R.I. Gen. Laws § 19-26-12 (1982)
SC	—	No Relevant Legislation
SD	—	No Relevant Legislation

(j4)

<u>STATE</u>	<u>AGE</u>	<u>CITATION</u>
TN	18	Tenn. Code Ann. § 45-6-110 (Repl. 1987)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 5069-51.16 (Supp. 1988)
UT	—	No Relevant Legislation
VT	18	Vt. Stat. Ann. tit. 9, § 3870 (Repl. 1984)
VA	—	No Relevant Legislation
WA	18	Wash. Rev. Code Ann. § 19.60.066(3) (Supp. 1988)
WV	—	No Relevant Legislation
WI	18	Wis. Stat. Ann. § 943.35(2) (1982)
WY	—	No Relevant Legislation

Totals (50 States and D.C.)

<u>Age</u>	<u>16</u>	<u>18</u>	<u>No Legislation</u>
<u>Number</u>	<u>3</u>	<u>27</u>	<u>21</u>

(k1)

APPENDIX K

STATE OF MARYLAND
Office of the Governor

[seal]

WILLIAM DONALD SCHAEFER In Reply Refer To:
GO-02 Governor

April 7, 1987

Honorable R. Clayton Mitchell, Speaker
Maryland House of Delegates
Room 101, State House
Annapolis, MD 21401

Dear Speaker Mitchell:

The matter of exempting minors from the death penalty will come before you in the form of Senate Bill 598. When it does, I hope you will treat it favorably.

The measure bears impressive credentials. It is the first bill of its kind to pass the Senate. I was struck by the fact that the decisive Senate votes came not from newly-elected members of that Chamber, but from Senate veterans who had opposed an exemption for minors in previous years.

The bill also has the support of the principal spokespeople of all of the State's major religious faiths. This impressive coming together of our State's religious leadership may be unprecedented.

I believe it is for the good of the children of our State to establish a minimum age for the imposition of the death penalty, indeed, as have most other states and most other nations. Maryland law itself currently recognizes that age can be considered a mitigating factor at the sentencing phase of a capital trial.

(k2)

I must, however, express my concern with the Amendments placed on the bill by the Judiciary Committee. These Amendments would change the application of the death penalty exemption from under 18 to under 16. Eighteen years of age is recognized by international agreements to which the United States is signatory as the appropriate age for which the death penalty for capital crimes should be considered. Indeed, nine other states in our country set a minimum of 18 for the imposition of the death penalty. This is a significantly larger number of states than those which recognize any other minimum age cutoff.

As a State, we also distinguish the actions of children from the actions of adults. In the area of contracts, motor vehicles and voting, we recognize that juveniles are not fully responsible for their actions. Society as a whole shares responsibility for the actions of its children.

I have not come to this position quickly or lightly. Families and friends of murder victims have intense and legitimate needs, most often overlooked by the criminal justice process. Although we have made tremendous efforts as a State to help victims to no longer be dominated by their tragic loss, much more needs to be done. However, I do not believe that the execution of convicted juveniles can contribute to us fulfilling our obligation to crime's victims.

It is my sincere hope that you will work to return Senate Bill 598 to the same posture as it was first read in the House of Delegates and act favorably on our legislation.

Thank you very much for allowing me to express my views to you on this important issue. I know that this issue is an important personal decision for all of us to make.

Sincerely,

/s/ Don Schaefer
Governor

cc: Members of the
House of Delegates

(l1)

APPENDIX L

PERTINENT STATE STATUTES RESPECTING STATUS OF YOUTH IN DEATH PENALTY STATES

Minimum Age of Offender Required by Capital Punishment Jurisdictions

Age at Offense	Total	Jurisdiction
18:	12	California (Cal. Penal Code § 190.5 (1988)) Colorado (Col. Rev. Stat. § 16-11-103(1)(a) (Repl. 1986)) Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (1985)) Illinois (38 Ill. Ann. Stat. § 9-1(b) (Supp. 1988)) Maryland (27 Md. Code § 412(F) (1988)) Nebraska (Nebr. Rev. Stat. § 28-105.01 (1985)) New Hampshire (N.H. Rev. Stat. Ann. § 630:5(XIII) (Supp. 1987)) (prohibiting execution of one who was a minor at the time of the offense); <i>id.</i> at § 21-B:1 (age of majority in New Hampshire is age 19); <i>but see id.</i> at § 630:1(v) (prohibits holding anyone under age 17 to be culpable of a capital offense) New Jersey (N.J. Stat. Ann. §§ 2A:4A-22(a) (1987) & 2C:11-3g (West Supp. 1988)) New Mexico (N.M. Stat. Ann. § 31-18-14(A) (Repl. 1987)) Ohio (Ohio Rev. Code Ann. § 2929.02(A) (1987)) Oregon (Ore. Rev. Stat. §§ 161.620 & 419.476(1) (Supp. 1987))

(12)

Age at Offense	Total	Jurisdiction
		Tennessee (Tenn. Code Ann. §§ 37-1-102(3), (4) (Supp. 1987); 37-1-103 (Repl. 1984); 37-1-134(a)(1) (Repl. 1984))
17:	3	Georgia (OCGA § 17-9-3 (Supp. 1988); <i>see also Bankston v. State</i> , 367 S.E.2d 36 (Ga. 1988))
		North Carolina (N.C. Gen. Stat. § 14-17 (Supp. 1987))
		Texas (Tex. Penal Code Ann. § 8.07(d) (Supp. 1988))
16:	3	Indiana (Ind. Rev. Code § 35-50-2-3(b) (Supp. 1988))
		Kentucky (Ky. Rev. Stat. Ann § 640.040(1) (1987))
		Nevada (Nev. Rev. Stat. § 176.025 (1986))

**Statutes Specifically Listing Age of Offender
As Mitigating Factor**

(28 States)

ALABAMA: Ala. Code § 13A-5-51(7) (1982)
 ARIZONA: Ariz. Rev. Stat. Ann. § 13-703G.5 (Supp. 1987)
 ARKANSAS: 5 Ark. Code Ann. § 5-4-605(4) (1987)
 CALIFORNIA: Cal. Penal Code § 190.05(h)(9) (1988)
 COLORADO: Colo. Rev. Stat. § 16-11-103(5)(a) (1986)
 CONNECTICUT: Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (Supp. 1988)
 FLORIDA: Fla. Stat. Ann. § 921.141(6)(g) (1985)
 INDIANA: Ind. Code Ann. § 35-50-2-9(c)(7) (Supp. 1988)
 KENTUCKY: Ky. Rev. Stat. § 532.025(2)(b)(8) (1985)

(13)

LOUISIANA: La. Code Crim. Proc. Ann. art. 905.5(f) (1984)
 MARYLAND: Md. Code art. 27, § 413(g)(5) (1988)
 MISSISSIPPI: Miss. Code Ann. § 99-19-101(6)(g) (Supp. 1987)
 MISSOURI: Mo. Rev. Stat. § 565.032(3)(7) (1987)
 MONTANA: Mont. Code Ann. § 46-18-304(7) (1987)
 NEBRASKA: Nebr. Rev. Stat. § 29-2523(2)(d) (1985)
 NEVADA: Nev. Rev. Stat. § 200.035(6) (1986)
 NEW HAMPSHIRE: N.H. Rev. Stat. Ann. § 630.5(II)(b)(5) (1986)
 NEW JERSEY: N.J. Stat. Ann. § 2C:11-3(c)(5)(c) (Supp. 1988)
 NEW MEXICO: N.M. Stat. Ann. § 31-20A-6(I) (1987)
 NORTH CAROLINA: N.C. Gen. Stat. § 15A-2000(f)(7) (1983)
 OHIO: 29 Ohio Rev. Code Ann. §§ 2929.04 (B)(4), 2929.023, (1987)
 PENNSYLVANIA: Pa. Cons. Stat. Ann. art. 42, § 9711(e)(4) (1982)
 SOUTH CAROLINA: S.C. Code Ann. 16-3-20(c)(b)(7) & (9) (Supp. 1987)
 TENNESSEE: Code Ann. § 39-2-203(j)(7) (1982)
 UTAH: Utah Code Ann. § 76-3-207(2)(e) (Supp. 1988)
 VIRGINIA: Va. Code § 19.2-264.4(B)(v) (1983)
 WASHINGTON: Wash. Rev. Code § 10.95.070(7) (Supp. 1988)
 WYOMING: Wyo. Stat. § 6-2-102(j)(vii) (1988)

(m1)

APPENDIX M

JUVENILE AND TOTAL EXECUTIONS IN THE
UNITED STATES, BY DECADE, JANUARY 1, 1900
THROUGH JUNE 30, 1988

<u>Decade</u>	<u>Total Executions</u>	<u>Juvenile Executions</u>	<u>Percentage</u>
1900-09	1,192	23	1.9%
1910-19	1,039	24	2.3%
1920-29	1,169	27	2.3%
1930-39	1,670	41	2.5%
1940-49	1,288	53	4.1%
1950-59	716	16	2.2%
1960-69	191	3	1.6%
1970-79	3	0	0%
1980-88	<u>97</u>	<u>3</u>	<u>3.1%</u>
Totals:	7,365	190	2.6%

Sources of data: W. Bowers, *Legal Homicide* 54 (1984); V. Streib, *Death Penalty for Juveniles* 191-208 (1987); NAACP Legal Defense and Educational Fund, Inc., *Death Row, U.S.A.* 1 (May 1, 1988).

(nl)

APPENDIX N

DEATH SENTENCES FOR JUVENILE OFFENDERS,
JANUARY 1, 1982 THROUGH JUNE 30, 1988

Year	Offender's Name	Age at Crime	State	Current Status
1982 (11)	Barrow, Lee	17	TX	reversed in 1985
	Cannon, Joseph	17	TX	now on death row
	Carter, Robert	17	TX	now on death row
	Garrett, Johnny	17	TX	now on death row
	Johnson, Lawrence	17	MD	reversed twice but resentenced to death in 1983 and 1984
	Lashley, Frederick	17	MO	now on death row
	Legare, Andrew	17	GA	reverse ^d in 1983; resentenced to death in 1984; reversed in 1986
	Stanford, Kevin	17	KY	now on death row
	Stokes, Freddie	17	NC	reversed in 1982; resentenced to death in 1983; reversed in 1987
	Thompson, Jay	17	IN	reversed in 1986
	Trimble, James	17	MD	now on death row
1983 (9)	Bey, Marko	17	NJ	now on death row
	Cannady, Attina	16	MS	reversed in 1984
	Harris, Curtis	17	TX	now on death row
	Harvey, Frederick	16	NV	reversed in 1984
	Hughes, Kevin	16	PA	now on death row
	Johnson, Lawrence	17	MD	reversed in 1983, but resentenced to death in 1984
	Lynn, Frederick	16	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	MS	reversed in 1985
1984(6)	Stokes, Freddie	17	NC	reversed in 1987
	Aulisio, Joseph	15	PA	reversed in 1987

(n2)

Year	Offender's Name	Age at Crime	State	Current Status
	Brown, Leon	15	NC	reversed in 1988
	Johnson, Lawrence	17	MD	now on death row
	Legare, Andrew	17	GA	reversed in 1986
	Patton, Keith	17	IN	reversed in 1987
	Thompson, W. Wayne	15	OK	reversed in 1988
1985(5)	Livingston, Jesse	17	FL	reversed in 1988
	Morgan, James	16	FL	now on death row
	Ward, Ronald	15	AR	reversed in 1987
	Williams, Raymond	17	PA	reversed in 1987
	Wills, Bobby	17	TX	now on death row
1986(7)	Comeaux, Adam	17	LA	reversed in 1987
	Cooper, Paula	15	IN	now on death row
	LeCroy, Cleo	17	FL	now on death row
	Lynn, Fredrick	16	AL	now on death row
	Sellers, Sean	16	OK	now on death row
	Wilkins, Heath	16	MO	now on death row
	Williams, Alexander	17	GA	now on death row
1987(2)	Dugar, Troy	15	LA	now on death row
	Lamb, Wilbur	17	FL	now on death row
1988*(1)	Hegwood, Bernell	17	FL	now on death row

Source of Data: Victor Streib, Professor of Law, Cleveland State University School of Law.

* Current as of June 30, 1988.

(o1)

APPENDIX O

THIRTY-EIGHT PERSONS ON DEATH ROW AS OF
DECEMBER 31, 1983, FOR CRIMES COMMITTED WHILE
UNDER AGE EIGHTEEN

State	Prisoner	Age at Time of Offense
Alabama	Davis, Timothy	17
	Jackson, Carnel	16
	Lynn, Frederick	17
Florida	Magill, Paul	17
	Morgan, James	16
	Peavy, Robert	17
Georgia	Bruger, Christopher	17
	Buttrum, Janice	17
	High, Jose	17
	Legare, Andrew	17
Indiana	Thompson, Jay	17
Kentucky	Ice, Todd	15
	Stanford, Kevin	17
Louisiana	Prejean, Dalton	17
Maryland	Johnson, Lawrence	17
	Trimble, James	17
Mississippi	Cannaday, Attina	16
	Jones, Larry	17
	Mhoun, James	16
	Tokman, George	17
Missouri	Lashley, Frederick	17
Nevada	Harvey, Frederick	16

(o2)

State	Prisoner	Age at Time of Offense
New Jersey	Bey, Marko	17
N. Carolina	Oliver, John	14
	Stokes, Freddie	17
Oklahoma	Eddings, Monty	16
Pennsylvania	Hughes, Kevin	16
S. Carolina	Roach, James	17
Texas	Barrow, Lee	17
	Battie, Billy	17
	Burns, Victor	17
	Cannon, Joseph	17
	Carter, Robert	17
	Garrett, Johnny	17
	Graham, Gary	17
	Harris, Curtis	17
	Pinkerton, Jay	17
	Rumbaugh, Charles	17

* Sources of data: NAACP Legal Defense and Educational Fund, Inc., *Death Row, U.S.A.* (Dec. 20, 1983); Brief for Petitioner at 19a app. E, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); V. Streib, *Death Penalty for Juveniles* 31 (1987).

(p1)

APPENDIX P

**TWENTY-EIGHT PERSONS ON DEATH ROW AS OF JUNE
1988, FOR CRIMES COMMITTED WHILE UNDER AGE
EIGHTEEN**

State	Prisoner	Age at Time of Offense
Alabama	Davis, Timothy	17
	Lynn, Frederick	16
Florida	LeCroy, Cleo	17
	Hegwood, Bernell	17
	Livingston, Jesse	17
	Lamb, Wilburn	17
	Morgan, James	16
Georgia	Burger, Christopher	17
	Buttrum, Janice	17
	High, Jose	17
	Williams, Alexander	17
Indiana	Cooper, Paula	15
Kentucky	Stanford, Kevin	17
Louisiana	Dugar, Troy	15
	Prejean, Dalton	17
Maryland	Johnson, Lawrence	17
	Trimble, James	17
Mississippi	Jones, Larry	17
Missouri	Lashley, Frederick	16
	Wilkins, Heath	16
Oklahoma	Sellers, Sean	16

(p2)

State	Prisoner	Age at Time of Offense
Pennsylvania	Hughes, Kevin	16
Texas	Cannon, Joseph	17
	Carter, Robert	17
	Harris, Curtis	17
	Garrett, Johnny	17
	Wills, Bobby	17
	Graham, Gary	17

* Sources of data: NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (May 1, 1988); Letter from Tanya Coke, NAACP Legal Defense and Educational Fund to Michael Mello (Aug. 18, 1988); Streib, Persons on Death Row as of June 24, 1988, for Crimes Committed While Under Age Eighteen (June 24, 1988) (unpublished report prepared by Professor Victor Streib, Cleveland State Univ. School of Law).

(q1)

APPENDIX Q

ARRESTS FOR WILLFUL CRIMINAL HOMICIDE, BY AGE GROUPS, JANUARY 1, 1982, THROUGH JUNE 30, 1988

Year	Arrests for All Ages	Arrests for Age 17 & Younger	% of Arrests for All Ages
1982	18,511	1,579	8.5%
1983	18,064	1,345	7.4%
1984	13,676	1,004	7.3%
1985	15,777	1,311	8.3%
1986	16,066	1,396	8.7%
1987	15,903	1,526	9.6%
1988*	(8,000)**	(750)**	(9.4%)**
Totals:	105,997	8,911	8.4%

* data current as of June 30, 1988

** estimated because exact data unavailable

Sources of Data: *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2697 (1988) (plurality); United States Department of Justice, Uniform Crime Reports: Crime in the United States 174 (1987); *id.* at 174 (1986); *id.* at 174 (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); and Appendices B, C, D, and E.

(r1)

APPENDIX R

DEATH SENTENCES FOR WILLFUL CRIMINAL
HOMICIDE, BY AGE GROUPS, JANUARY 1, 1982,
THROUGH JUNE 30, 1988

Year	Death Sentences For All Ages	Death Sentences For Age 17 & Younger	% of Death Sentences For All Ages
1982	284	11	3.9%
1983	259	9	3.5%
1984	280	6	2.1%
1985	273	5	1.8%
1986	297	7	2.4%
1987	(280)*	2	(0.7%)*
1988**	(140)*	1	(0.7%)*
Totals:	1,813	41	2.3%

*estimated because exact data unavailable

**data current as of June 30, 1988

Sources of Data: *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2697 (1988) (plurality); United States Department of Justice, Capital Punishment 1985, at 6 (1987); *id.* at 6 (1984) and Appendices B, C, D, and E.

(s1)

APPENDIX S

MISSOURI DEATH SENTENCE CASES

Defendant	Age	Notes
Amrine, Joseph	28	
Antwine, Calvert	24	
Baker, Robert	30	
Bannister, Alan	24	
Battle, Thomas	18	
Bibb, Ray	23	Plead guilty
Blair, Walter	18	
Bolder, Martsay	21	
Boliek, Williams	27	
Byrd, Maurice	24	
Cavaness, John	59	
Chambers, James	30	Rev'd and retried
Clemmons, Eric	23	
Driscoll, Robert	42	
Foster, Emmitt	31	
Gilmore, George	33	
Gilmore, George	34	Rev'd and retried
Griffin, Larry	25	
Griffin, Milton	25	Hung jury
Griffin, Richard	27	
Grubbs, Ricky	26	
Guinan, Frank	35	
Guinan, Frank	40	
Harvey, Walter	20	Rev'd
Johns, Stephen	36	
Jones, Marvin	62	
Jones, William	21	
Kenley, Kenneth	23	
Kilgore, Bruce	26	
LaRette, Anthony	28	
Lashley, Frederick	16	
Laws, Leonard	31	
Leisure, David	33	
Lingar, Stanley	21	
Mallett, Jerone	26	
Malone, Kelvin	21	
Mathenia, Chuck	25	

(s2)

Defendant	Age	Notes
McDonald, Samuel	32	
McIlvoy, Terry	24	
McMillan, Richard	24	
Mercer, George	34	
Murray, Robert	22	
Nave, Emmett	43	
Newlon, Rayfield	23	
O'Neal, Robert	22	
Parkus, Steven	25	
Pollard, Roosevelt	19	
Powell, Reginald	19	
Preston, Elroy	27	
Reese, Donald	44	
Roberts, Roy	36	
Rodden, James	23	
Sanders, Clendell	31	Hung jury
Schlup, Lloyd	23	
Schneider, Eric	23	
Schnick, James	36	
Shaw, Bobby	28	
Sidebottom, Robert	23	
Sloan, Jeffrey	19	
Smith, Gerald	21	
Smith, Gerald	27	
Stokes, Winfred	26	
Sweet, Glennon	32	
Trimble, Patrick	20	
Wacaser, Nila	39	
Walls, Robert	20	
Wells, Luther	38	
Wilkins, Heath	16	Plead guilty; asked for death
Williams, Doyle	33	
Young, Moses	27	
Zeitvogel, Richard	28	

(s3)

MISSOURI LIFE SENTENCE CASES

Defendant	Age	Death Waived By State	Notes
Alexander, John	33	X	
Allen, George	25	X	
Allen, Robert	16		
Allen, Shirley	38	X	
Armbruster, Randall	19	X	
Arnold, Robert	38		
Ayers, Carl	19	X	
Barr, Ronnie	25		
Bashe, Jay	31		Rev'd
Baskerville, Rickey	19		
Beck, Joseph	19		
Betts, James	28	X	
Petts, James	28	X	
Bible, Gary	42		
Borden, Roberta	35		
Bostic, Joe	35		
Bounds, Jack	47		Judge-trying
Boyd, Alfred	53	X	
Boyd, Stanley	21		
Brown, Mark	19	X	Judge-trying
Bryant, John	27	X	
Burke, William	60	X	Rev'd
Burton, Darryl	22	X	
Canterbury, Terry	26		
Carr, Jason	16	X	
Carr, Rodney	21		Hung jury
Carter, George	48	X	
Cason, Timothy	16	X	Death penalty waived at request of victim's widow
Clark, Gene	39		
Clark, Raphael	21		
Clay, David	39	X	
Clements, Ronald	17		
Clemmons, Eric	20	X	
Clevenger, Roxie	65	X	Rev'd
Coleman, Betty	24		
Cranmer, Roy	25	X	
Crespo, Jose	35	X	
Dayringer, Joseph	16	X	

(s4)

Defendant	Age	Death Waived By State	Notes
Dennis, Roger	21	X	
Dickson, Christopher	21	X	
Downs, Jerome	23		
Dunn, Emmitt	25		
Edwards, David	17		
Eggers, William	53		
Emerson, Larry	30		
Engleman, Glennon	53		Hung jury
Epps, Edward	25	X	
Fields, Eugene	22	X	
Follins, Byron	20		
Ford, Michael	20	X	
Ford, Robert	34	X	Rev'd
Franco, Alfred	33	X	
Fuhr, Jerry	23		Rev'd
Gardner, Stephen	24		Rev'd
Garner, Leon	30	X	
Gebhardt, William	17	X	
Greathouse, Robin	17		
Griffin, Lamont	18	X	
Groves, David	19	X	
Hall, James	33	X	
Hall, Jesse	39	X	
Hankins, Ronnie	30	X	
Harper, Ronald	22		
Harvey, Walter	20		
Hemme, Sandra	20	X	
Hemphill, John	26	X	
Hemphill, Roman	25	X	
Henderson, Judy	32		
Holmes, Roderick	22	X	
Hudgins, Edward	27	X	
Hughes, Becca	34	X	
Hurt, Charles	19		
Ingram, Lorn	24	X	
Jackson, James	24		
Jensen, Mitchell	21		
Jimmerson, Danny	28	X	
Johnson, Cornelius	26		Rev'd, retried
Johnson, Ivory	36	X	
Jones, Craig	22		Hung jury
Jones, Verna	39		Hung jury
Kennedy, Joseph	52		
Kinnard, Andrew	46	X	Rev'd

(s5)

Defendant	Age	Death Waived By State	Notes
LaNasa, Joseph	35		Hung jury
Lawrence, Edward	28		
Laws, Leonard	31		
Laws, Leonard	31		
Leisure, Anthony	33		
Lewis, Theodore	21	X	Judge-trying
Loggins, Lobester	21	X	
Lomax, Leslie	28		
Luckett, Willie	27		
Lute, Shirley	48	X	Rev'd, retried
Malady, John	24		
Martin, Helen	33	X	
Martin, Robert	34		
McConnell, James	46	X	
Merchant, Roger	37		
Merritt, Derrick	22		
Merritt, Gary	29		
Miller, Delores	54	X	
Miller, Verdiana	36	X	
Mitchell, Ervin	51	X	
Mitchell, Johnnie	24		Hung jury
Morris, Anthony	22	X	
Murray, William	30		
Neal, Lonnie	20	X	Rev'd
Noel, James	42	X	
Owens, Antoine	20		
Patterson, Dale	18	X	Rev'd
Potter, James	18		Judge ruled agg. cir. insufficient and in- structed jury to sign form for life
Powell, Clifton	28		Hung jury
Powell, Hubert	56		
Prewitt, Patricia	34	X	
Price, Darryl	19	X	
Randolph, Ronald	20	X	Rev'd, retried
Reasonover, Ellen	24		Hung jury
Reynolds, Gary	33	X	
Rickey, Marvin	27	X	
Roberts, Gary	38		
Robinson, Glenn	23	X	
Roby, Steven	29	X	
Rodden, James	23		
Roland, Thereon	17		

(s6)

Defendant	Age	Death Waived By State	Notes
Royal, Phillip	32		
Salkil, Daniel	29		
Sanders, George	25	X	
Sanders, Richard	28		Hung jury
Sargent, Vincent	23		
Scott, Jeffrey	16		
Scott, Keith	17	X	Rev'd
Scott, Kent	25	X	
Shaw, Michael	24	X	
Smith, Leroy	66	X	
Smith, Otis	46		
Spivey, Wallace	22	X	Rev'd
Stephens, James	32		
Steward, Donald	16	X	Rev'd
Stewart, Rodnie	25		
Stith, Michael	23	X	
Strickland, Kevin	19	X	
Stuckey, bobbie	32	X	
Sturgeon, William	37	X	
Tate, David	23		
Taylor, Jerry	29	X	Remanded for hearing
Thomas, Lawrence	29		
Turner, Willie	29		
Valentine, Glenn	32	X	
Ware, David	23		
Washington, James	27		
Weatherspoon, Barry	26		
Webster, Byron	30	X	
White, Donnell	17		Vacated
White, Michael	19	X	
White, Roy	40		
Williams, Doyle	33		
Williams, Ernest	28		Hung jury
Williams, James	31		
Williams, James E.	27		
Williams, Rondell	18	X	
Williams, Vicky	24		
Wilson, Alvin	18	X	
Wirth, William	54		
Woods, Burton	25		
Woods, Willard	34		
Woolsey, Ricky	29		

(s7)

Defendant	Age	Death Waived By State	Notes
Yingst, Terry	28	X	Rev'd
Zeitvogel, Richard	24		

Source: Nancy McKerrow, Esq., Counsel for Petitioner in
Wilkins v. Missouri, No. 87-6026.

MOTION FILED
AUG 17 1988

Nos. 87-5666 and 87-6026

87-5765
In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.87-5666

JOSE MARTINEZ HIGH v. ZANT, WARDEN

No.87-6026

HEATH A. WILKINS v. MISSOURI

On Writs of Certiorari to the
Supreme Court of Georgia and
Supreme Court of Missouri

MOTION FOR LEAVE
TO FILE

AMICUS CURIAE BRIEF
of the
WEST VIRGINIA COUNCIL OF CHURCHES
On Behalf of the Petitioners

Paul R. Stone,
Attorney for Amicus
239 Peoples Bldg.
Charleston, W.Va.25301
(304) 344-5400

508

MOTION FOR LEAVE TO FILE

BRIEF AMICUS CURIAE

Amicus, West Virginia Council of Churches, respectfully requests that this Court grant permission to file the appended Brief, for the following reasons: Counsel for Amicus has not received any responses from letters sent to the attorneys for the Parties a sufficient time ago, except in one instance. Amicus is intensely concerned with the issues involved in these cases, and feels that to put teenagers to death is unconstitutional.

Amicus has reason to believe that general considerations as to the proffered unconstitutionality of capital punishment may not be urged herein (in the Brief of Amicus, this is covered); other esoteric considerations, including the physiological/psychological effects of puberty, and potential discrimination,

Amicus believes, is not briefed in the same way as the appended Brief and, hence, the matters contained in the Brief of the Amicus, it is believed, will be of substantial additional aid to the Court in its deliberations in these cases. This is not meant to deprecate, in any way, the salutary efforts of the Parties herein or of their Counsel.

Respectfully,

Paul R. Stone,

Counsel for Amicus

West Virginia Council
of Churches

ENTRY OF APPEARANCE

The undersigned attorney, Paul R. Stone, a member of the Bar of this Court since 1963, and authorized by the West Virginia Council of Churches (headquartered in Charleston, West Virginia) to represent it in the matter of filing the appended Amicus Curiae Brief, hereby apprises the Court of his appearance in this matter.

Date: *Aug. 13* 1988

Paul R. Stone
Paul R. Stone

CERTIFICATE OF SERVICE

The undersigned, Paul R. Stone, Attorney, hereby certifies that on *Aug. 13*, 1988, he effected service, via First Class U.S. Mail, sufficient postage affixed thereto, of the annexed papers in this case and including the Brief of the Amicus (40 copies thereof being also sent, via similar U.S. mail service, to the U.S. Supreme Court, Washington, D.C., 20543), 3 copies to Parties' Counsel (as follows):

o/b/o No.87-5666, High v. Zant
Bradley Stetler, Esq., 127 Pine St.
Burlington, Vermont 05401 and
Mary Beth Westmoreland, Asst. A/G of Ga.
132 State Judicial Bldg, Atlanta, GA 30334

o/b/o No.87-6026, Wilkins v. Mo.
Nancy McKerrow, 209B East Green Meadows
Rd., Columbia, Mo. 65203; and
John Morris, III, Asst. A/G of Mo.,
P.O. Box 899, Jefferson City, Mo. 65102

All Parties required to be served have been served.

Paul R. Stone
Paul R. Stone, Counsel for Amicus
West Virginia Council of Churches

No. 87-6026

No. 87-5666

87-5765

Supreme Court, U.S.

FILED

SEP 2 1988

PANIEL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

vs.

WALTER ZANT, WARDEN,

Petitioner,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Eleventh Circuit.

HEATH A. WILKINS,

vs.

STATE OF MISSOURI,

Petitioner,

Respondent.

On Writ of Certiorari to the Supreme Court of the State
of Missouri

Brief for Amicus Curiae
International Human Rights Law
Group in Support of Petitioners

Thomas S. Williamson, Jr.
Mary Ellen O'Connell
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Robert H. Kapp*
Larry Garber
International Human
Rights Law Group
733-15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 639-8016

*Counsel of Record

Attorneys for Amicus Curiae
International Human Rights Law Group

September 2, 1988

52/2/1

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BRIEF OF INTERNATIONAL HUMAN
RIGHTS LAW GROUP

INTEREST OF AMICUS

Amicus Curiae International
Human Rights Law Group has obtained the
written consent of the parties to file
this brief.^{1/}

The International Human Rights
Law Group ("Law Group") is a non-profit
public interest organization incorporated
in the District of Columbia. Its goals
include the development and promotion of
legal norms of international human rights.
To that end, the Law Group has represented

^{1/} The parties' letters of consent to the filing
of this brief are being filed with the Clerk of
Court pursuant to Rule 36.2 of the Rules of this
Court.

individuals and organizations, on a pro bono basis, before United States and international tribunals.

With respect to the execution of juvenile offenders in the United States, the Law Group submitted an amicus curiae brief in Thompson v. Oklahoma, ____ U.S. ___, 108 S. Ct. 2687 (1988), in which the Court vacated the death sentence for a crime committed when the defendant was 15. Representatives of the Law Group have testified in opposition to juvenile capital punishment before Congress, and the Law Group co-sponsored a petition challenging the practice before the Inter-American Commission on Human Rights.

In Thompson, this Court found - that in some circumstances the execution of juveniles violates the Eighth Amendment to the Constitution. The Law Group

respectfully submits and intends to demonstrate that execution of any person under the age of 18 offends internationally-accepted standards of decency and thereby violates the Eighth Amendment to the Constitution. Such executions also violate treaties signed by the United States and rules of customary international law binding on the United States.

STATEMENT OF THE CASES

Petitioner Jose Martinez High was found guilty of capital murder, armed robbery, kidnapping, aggravated assault and possession of a firearm by a jury in Taliaferro County, Georgia on December 1, 1978. On the same day, he was sentenced to death.

The State's evidence showed that on the night of July 26, 1976, High and

two accomplices robbed a gas station attendant at gunpoint, then kidnapped him along with his eleven-year-old stepson. High and the others drove the victims to a remote place and shot them. The attendant survived; his son died. The case has been reviewed numerous times. The Supreme Court of Georgia and the U.S. Court of Appeals for the Eleventh Circuit have upheld the death sentence.

The acts described above occurred when High was 17 years of age. Under Georgia law, although the age of majority for most purposes is 18, persons are treated as adults at age 17 under the criminal code. Georgia law prohibits executions of persons under the age of 16, and thus, unlike the Thompson case, the state law clearly permits the execution of Jose Martinez High.

Petitioner Heath A. Wilkins pleaded guilty to first degree murder on May 9, 1986, in the Circuit Court of Clay County, Missouri. Wilkins admitted involvement in the murder of a liquor store clerk on July 27, 1985. The court sentenced him to death on June 27, 1986. His case was appealed to the Missouri Supreme Court which upheld the death sentence.

Wilkins committed the murder when he was 16 years and 7 months old. Under the Missouri criminal code, 17 year olds are treated as adults, but people as young as 14 may be certified for trial as adults. Wilkins was so certified. The adult criminal code in Missouri has no minimum age for capital punishment.

SUMMARY OF ARGUMENT

In Thompson v. Oklahoma, a plurality of this Court held that the execution of any person who committed a crime while under the age of 16 violates the Eighth Amendment to the Constitution. Under the same analysis as that employed in Thompson, this Court should find that execution of any person for a crime committed when he was under the age of 18 also violates the Eighth Amendment. Moreover, such executions violate treaty obligations of the United States, as well as its obligations under customary international law.

Part I of this brief discusses the Eighth Amendment's prohibition on cruel and unusual punishment as set forth in Thompson. Although the Justices were divided as to the proper holding in

Thompson, they agreed on the proper approach to analyzing the Eighth Amendment. The Justices agreed that the Court must assess "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

The plurality recognized the level of international consensus as one of the standards to consider in evaluating the constitutionality of a punishment in this country. Similarly, how the United States provides for the human rights of its own citizens is properly the concern of other civilized nations. If the United States fails to recognize those concerns it may find it is violating human rights obligations. At the least, it may find it does not maintain as high a standard of

human rights as those states it most respects.

In widely-adopted treaties and international practice cited by the Thompson plurality, 18 rather than 16 is the age that other nations agree is the acceptable minimum. Similarly, in widely-adopted resolutions of international organizations, persons who commit crimes under the age of 18 are not subject to capital punishment. The United States has participated in the debates regarding adoption of these resolutions and has signed several human rights treaties without objecting to the prohibition on executing persons for crimes committed under age 18.

In Part II of the Brief, Amicus discusses the United States' international legal obligations relevant to capital

punishment for persons who commit crimes while under the age of 18. The International Covenant on Civil and Political Rights and the American Convention on Human Rights forbid, in all circumstances, execution of persons under 18 at the time of their offense. The United States has signed these two treaties. International law requires that a signatory may not undermine the objectives and purposes of a treaty pending its ratification. Execution of petitioners will undermine the objectives and purposes of treaties forbidding such executions. Consequently, the United States may not execute petitioners.

Even if the United States were not a signatory to these Conventions, customary international law would forbid the execution of petitioners. By now,

widespread practice combined with the predominant view that nations are bound to forbid the execution of juvenile offenders has effectively created a rule of customary international law. This international law is part of United States law and is superior to the laws of the several states. Therefore, the United States' treaty obligations and the rules of customary international law prohibit the execution of petitioners High and Wilkins because both were under the age of 18 when they committed their respective crimes.

ARGUMENT

I. Objective Standards of Decency
Established by the International
Community Prohibit the Execution
of Juvenile Offenders.

In Thompson v. Oklahoma, _____
U.S. _____, 108 S. Ct. 2687 (1988), the
plurality held that execution of a person
for a crime committed when he was under
the age of 16 violates the Eighth Amend-
ment's prohibition of cruel and unusual
punishment. The plurality expressly
stated that it had not resolved the issue
whether execution of a person for a crime
committed below the age of 18 would also
violate the Constitution. Id. at 2700.
This question, among others, is now before
the Court as it considers the instant
cases. In both cases, the petitioners
face the death sentence for crimes

committed when they were over the age of 16 but under the age of 18; further, in Georgia, such executions are clearly permitted by that jurisdiction's statutory law.

In Thompson, the eight Justices agreed that the key to Eighth Amendment analysis is to examine "evolving standards of decency" in society. Among the standards relied on by the plurality and by the Court in past cases are those established by the international community. With regard to juvenile execution, the international community has reached a consensus that execution of persons who committed crimes while under the age of 18 offends civilized standards of decency.

A. Eighth Amendment Analysis
Requires Objective
Assessment of Social
Evolution.

In Thompson, all the Justices agreed that Chief Justice Warren's opinion in Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) sets forth the applicable standard for Eighth Amendment analysis:

The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society'.

Thompson at 2691 (Stevens, J., quoting Trop at 101); see also Thompson at 2706 (O'Connor, J., concurring); Thompson at 2714, (Scalia, J., dissenting).

Justice Scalia pointed out that the difficulty of assessing societal standards is that "it is all too easy to believe that evolution has culminated in one's own views." Thompson at 2715 (Scalia, J., dissenting). He advises, therefore, that the Court look to "objective" standards when assessing social evolution: "To avoid this danger [of subjectivity] we have, when making such an assessment in prior cases, looked for objective signs of how today's society views a particular punishment." Thompson at 2715, citing Furman v. Georgia, 408 U.S. 238, 277-79 (1972) (Brennan, J., concurring). Amicus agrees that this approach requires the assessment of objective societal standards, among which are the standards of the international community.

B. International Consensus
Provides an Objective Sign
of Social Evolution.

In looking for an objective sign of social evolution, the Thompson plurality examined the practice of American state legislatures and juries regarding the execution of persons below the age of 16. Equally significant, the plurality expressly considered the standards of the international community:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. Thus, the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in

the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Thompson at 2696 (emphasis added). In a footnote the plurality states:

In addition, three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights; Article 4(5) of the American Convention on Human Rights; [and] Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

Thompson at 2696 n.34, (citations omitted; emphasis added). Thus, the Thompson

plurality followed several prior cases where the Court stated that "international opinion" is among the "objective factors" which should inform the Court's analysis of the Eighth Amendment. See Emmund v. Florida, 458 U.S. 782, 788 (1982); Coker v. Georgia, 433 U.S. 584, 592, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102 (1958).^{2/}

The collective views of the majority for nations offer objective

^{2/} Despite this past precedent, Justice Scalia argues that international opinion is not relevant to Eighth Amendment analysis. "[R]eliance upon . . . civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this nation." Thompson at 2716 n.4. Justice Scalia offers no rationale for his radical departure from the Court's precedent. Moreover, this rejection of international standards is plainly inconsistent with his own admonition to look to objective standards outside the subjective opinions of the Justices.

criteria for evaluating domestic norms that are based on broader experience and reflection than the perspectives that we associate with juries and state legislatures in our own country. The Court has taken the position that looking to international standards helps alleviate Justice Scalia's expressed concerns relating to objectivity in discovering the standards of "civilized society."

Over the last 40 years, nations have adopted numerous human rights treaties and declarations to establish external standards for all states to observe. It is now accepted that countries should measure the treatment of their own citizens by international

standards.^{3/} The Court has had good reason, therefore, for considering international opinion in the past and is similarly justified in looking to the international consensus on the issues presented in this case.

C. International Standards of Decency Prohibit the Execution of Juveniles.

The development of our society with respect to standards of decency parallels the evolution in international society. Slavery and other gross violations of human rights were once tolerated; yet, they are tolerated no longer. International society has reached a consensus

^{3/} See L. Henkin, The Internationalization of Human Rights, Proceedings of the General Education Seminar, Vol. 6, No. 1 (Fall 1977) reprinted in part in Henkin, Pugh, Schachter, & Smit, International Law, at 984-96 (1987).

that no one may be executed for a crime committed when he was under 18. This consensus is reflected in the practice of nations, the signing and ratification of treaties, widely adopted resolutions of international organizations, and in the laws of various nations.

1. Treaties

Treaties are generally the best evidence of an international consensus. States do not simply express their views in treaties, but rather they bind themselves to specific obligations. The vast majority of states have affirmatively bound themselves in various international treaties not to execute persons for crimes committed when they were under the age of 18. As noted, the plurality in Thompson cited three such treaties which demonstrate the international consensus opposed

to juvenile executions. Supra p. 16. Justice O'Connor also acknowledged international opposition to juvenile execution. See Thompson at 2707-08 (O'Connor, J., concurring).

Significantly, the treaties cited by the five justices prohibit the execution of persons who committed crimes while they were under the age of 18. The first treaty cited by the plurality is the International Covenant on Civil and Political Rights which states in Article 6(5) that no person may be executed for crimes committed below 18 years of age.^{4/} No

^{4/} See supra p. 16. "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." International Covenant on Civil and Political Rights, annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16)

(footnote cont'd).

exceptions are cited. This Covenant has been signed by 58 nations, including the United States -- of the 58 signatories 50 have ratified the Covenant. An additional 36 states have pledged to adhere to the provisions of the Covenant, although these countries are not signatories.^{5/}

The travaux préparatoires show that during negotiations no state opposed Article 6(5).^{6/} Indeed, the drafters

(footnote cont'd)

at 53, U.N. Doc. A/6316 (1966) (signed but not ratified by the United States) reprinted in 6 I.L.M. 368, 370 (1967).

^{5/} Information on countries who have signed, ratified, or pledged to adhere to the International Covenant on Civil and Political Rights was obtained through a telephone interview from the United Nations Information Centre.

^{6/} See J. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. Cin. L. Rev. 655, 671-72 (1983).

considered Article 6(5) to be a codification of existing law.^{7/} Similarly, the United States did not object to the article during the negotiation process or set forth any reservations to this provision when it signed the Covenant. The United States supported a U.N. General Assembly Resolution that included Article 6 as a "minimum standard" binding on all Member States whether or not they are parties to the Covenant.^{8/}

The second convention cited by the plurality, the American Convention on Human Rights, also forbids capital punishment for crimes committed by anyone under

^{7/} Id.

^{8/} Id. at 681 n.94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

18.^{9/} Sixteen States have ratified this treaty. Another three have signed the Convention, including the United States. An additional four states have pledged to follow the Conventions' provisions.^{10/} Again, the United States did not object to the inclusion of this prohibition in the Convention.^{11/}

9/ See supra p. 16. "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." American Convention on Human Rights, No. 22, 1969, art. 4(5), O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, doc. 21, rev. 2 reprinted in 9 I.L.M. 673, 676 (1970).

10/ Information on countries who have signed, ratified, or pledged to adhere to the American Convention on Human Rights was obtained through a telephone interview from the United States Department of State.

11/ Observations and Proposed Amendments to the Draft of the Inter-American Convention on the Protection of Human Rights, T. Buergenthal and R.

(footnote cont'd)

Finally, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War specifically forbids the execution of any person for an offense committed while under 18 for any reason.^{12/} The United States and 154 other nations are parties to the Geneva Convention on the Protection of Civilian Persons in Time of War.^{13/} Although this Convention applies during time of war, a

(footnote cont'd)

Norris, The Inter-American System, Booklet 13, at 152 (1982).

^{12/} See supra p. 16. "[T]he death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 68, para. 4, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 330.

^{13/} Information on the number of parties to the Geneva Convention was obtained from the United States Department of State. See note 5, supra.

standard equally solicitous of the sanctity of youthful life should certainly apply in time of peace. The United States signed and ratified this Convention without asserting opposition to the prohibition prohibition of juvenile executions.^{14/} Thus, in the earliest stages of the formation of the consensus, the United States failed to mount any

^{14/} The only statement made by the United States regarding Article 68, para. 4 of the final version came during a Committee meeting at the Diplomatic Conferences in Geneva. The United States delegate stated the abolition of the death penalty in the case of protected persons under 18 years of age was a matter which called for very careful consideration before such a sweeping provision was adopted. Comment by Mr. Ginnane, in 19th Mtg, Committee III, May 19, 1949, in Final Report of the Diplomatic Conference of Geneva, Federal Political Department, Berne, n.d. Vol. II, § A, at 673.

opposition to the rule excluding juvenile offenders from punishment by death.^{15/}

2. Resolutions of
International
Organizations

In addition to the three treaties cited by the plurality in Thompson, there is other evidence of the international consensus forbidding execution of anyone under 18 when a crime was committed. The U.N. Economic and Social Council (ECOSOC) has adopted a resolution providing safeguards relating to the death penalty, one of which prohibits the execution of persons who committed crimes when they were under the age of 18

^{15/} 27th Plenary Mtg, Committee III, Aug. 3, 1949, in Final Report of the Diplomatic Conference of Geneva, Federal Political Department, Berne, n.d., Vol. II, § B, at 431.

years.^{16/} The U.N. General Assembly has endorsed these safeguards and asked the Secretary-General "to employ his best endeavors in cases where the safeguards . . . are violated."^{17/} In September 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, which endorsed the ECOSOC safeguards and urged all nations retaining the death penalty to implement those safeguards. The United States joined in the consensus on this resolution.^{18/}

^{16/} E.S.C. Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).

^{17/} G.A. Resolution 39/118, U.N. Doc. A/39/51, at 211, Oper. paragraphs 2 and 5 (1984).

^{18/} Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of

(footnote cont'd)

3. National Laws
and Practice

In addition to treaties, the plurality in Thompson referred to the law of various nations which still permit capital punishment. For example, according to the Court, Britain and New Zealand permit capital punishment only in limited circumstances, but never in the case of juvenile offenders. Thompson at 2696. Even in the Soviet Union, where capital punishment is available on a wider basis, the execution of juvenile offenders is prohibited. Id.

Even in the United States, laws in various jurisdictions which retain the death penalty nonetheless recognize that

(footnote cont'd)

Offenders (26 August to 6 September 1985) U.N.
Doc. A/Conf.121/22 at 86-87 (1985).

special considerations apply to juvenile offenders and at least twenty-one states have set a minimum age for imposition of the death penalty.^{19/} The Senate has recently set a minimum age for capital punishment at 18 in a bill authorizing the death penalty for certain drug-related crimes. S. Res. 2455, 100th Cong., 2d Sess., 134 Cong. Rec. S7580, S7580 (June 10, 1988). Opposition to the execution of persons who committed crimes while under the age of eighteen is underscored by the public declarations of various prestigious

^{19/} Nine have set the minimum age at 18 (including the recent addition of New Jersey, Indiana and Maryland). Twelve additional jurisdictions without a minimum age requirement expressly provide for age as one of the mitigating factors in imposing the death sentence. V. Streib, Minimum Statutory Ages for the Death Penalty (October 1, 1985) (unpublished memorandum).

United States legal bodies, including the American Law Institute and the American Bar Association. 20/

In addition to statutory law, Amnesty International has found that the practice of nations is not to impose the death penalty for crimes committed by persons under 18 years of age. Since 1979 over 11,000 legally-sanctioned executions have occurred, but in only 8 cases was the person under 18 at the time of the crime: three were Americans, the other executions occurred in Pakistan (2), Bangladesh,

20/ . American Law Institute Model Penal Code § 210.6(1)(d) (Proposed Official Draft, 1962); § 210.6, Comment, 1331 Official Draft and Revised Comments (1980); American Bar Association Report No. 117A, approved August 1983.

Rwanda and Barbados.^{21/} In a world of more than 165 countries, this statistic alone conclusively indicates an international consensus opposed to the execution of persons for crimes committed while under the age of 18.

Thus, the international community finds that execution of juvenile offenders violates accepted standards of

^{21/} Brief of Amicus Curiae Amnesty International In Support of Petitioner at 6, Thompson v. Oklahoma, ____ U.S. ____, 108 S. Ct. 2687 (1988) (No. 86-6169).

The evidence of an international consensus is necessarily limited because many states prohibit capital punishment altogether as inhumane. The practice of these states should be added to those which prohibit execution of persons under 18. See, e.g., European Convention on Human Rights, Protocol No. 6, April 23, 1983, 1983 Europ. T.S. No. 114 reprinted in 22 I.L.M. 539 (1983). This protocol prohibits capital punishment; it permits no qualifications or exceptions.

decency as shown in international treaties, resolutions of organizations, and the laws and practices of states.^{22/}

II. International Law Binding on the United States Prohibits the Execution of Juveniles.

International law prohibits the execution of those convicted of offenses committed prior to the age of 18. Thus, in addition to informing Eighth Amendment jurisprudence, international law, of its own force, prohibits the execution of juvenile offenders. Execution of either petitioner High or Wilkins will expressly

^{22/} See, e.g., Anglo Norwegian Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116 (Judgment of Dec. 18) (for a discussion of customary international law sources); see also U.S. v. LaJeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551); Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987).

violate a rule of United States law and would thereby violate an obligation the United States owes to other nations.

A. International Law is Part of United States Law.

International law is part of the domestic law of the United States. This fact has been reiterated by this Court innumerable times, most notably in the words of Justice Gray in The Paquete Habana:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves

peculiarly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. 677, 700 (1899). Justice Gray's words have recently been restated as the contemporary law of the United States in the Restatement (Third) of American Foreign Relations Law § 111(1) (1987) ("Restatement"):

International law and international agreements of the United States are law of the United States and supreme over the law of the several States [of the Union].

The Restatement explains that treaties are expressly held to be superior to state law by the Constitution, Article VI, § 2, and that customary international law, as part of federal law, is also superior to state law. See id. § 111, Comment d. Therefore, to the extent that either Missouri or Georgia law is contrary

to international law, it also violates the Supremacy Clause of the Constitution.

B. The United States Has
Signed and May Not
Undermine Treaties
Prohibiting Juvenile
Capital Punishment.

International law is found primarily in treaties and customary international law. See Statute of the International Court of Justice, art. 38(1); Restatement § 102. Both treaties and customary international law binding on the United States prohibit capital punishment of persons who were under the age of 18 at the time of the offense.

Treaties are often the clearest, most unequivocal source of particular international law rules binding on the United States. That is so in the case at bar. As discussed above, the United States is signatory to two treaties which

expressly obligate the United States not to execute petitioners, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.^{23/} The United States has signed, but not ratified, both conventions. Nevertheless, this country is bound by the articles prohibiting juvenile capital punishment in both treaties. Not only has the United States not made a reservation to either article, the United States recognizes the authority of the Vienna Convention on the Law of Treaties^{24/} which

^{23/} See supra, Part I.C. 1, pp. 20-26.

^{24/} See Letter of Submittal to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971). see also Interpretation of Treaties, 75 Am. J. Int'l. Law 147 (1981); International Law Commission, Report to the General Assembly (1966), 2 Ybk. Int'l. Comm'n 172, 202; McNair, The Law of

(footnote cont'd)

prevents the United States from undermining the object and purpose of a treaty this country has signed, even before ratification. Article 18 of the Vienna Convention provides:

[A] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

a. it has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty.

Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969) reprinted in 8 I.L.M. 679, 686 (1969).

To execute a juvenile offender in violation of either the International

(footnote cont'd)

Treaties (1961) at 199; Anzilotti, Cours de Droit International (Gidel trans. (1929)) at 372.

Covenant on Civil and Political Rights or the American Convention on Human Rights would plainly defeat the object and purpose of the articles prohibiting juvenile execution. Any sentence of death in violation of either of these Conventions should be stayed until, in the words of the Vienna Convention, the United States has "made its intention clear not to become a party to the treaty." Id. To date, the United States has manifested no such intention.

The Restatement (Third) of the Foreign Relations Law of the United States incorporates Article 18 of the Vienna Convention into § 312(3). As an example of an act that would "defeat the object and purpose" of a treaty, the Restatement discusses a test of a new nuclear weapon in contravention of a provision

prohibiting such tests in a signed, but unratified treaty. The effects of such a test, which would release significant radioactivity into the atmosphere, would be irreversible, since the atmospheric contamination could not be called back. Since the injury is irreversible, the Restatement concludes, such an act would defeat the object and purpose of the treaty in the sense forbidden by the Vienna Convention and customary international law.

Similarly, a life taken by execution is irretrievable. If the United States permits the execution of a juvenile offender, the purpose and object of the signed, but unratified human rights conventions would be defeated in the sense proscribed by the Vienna Convention and the Restatement. Thus, legal obligations

binding on the United States would be breached.

C. Customary International Law
Binding on the United
States Also Prohibits
Juvenile Executions.

Even if the United States withdrew its signature from The International Covenant on Civil and Political Rights and the American Convention on Human Rights, it would still be bound by customary international law which now prohibits capital punishment of persons for crimes committed when they were under age 18. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2).

As discussed above,^{25/} treaties, resolutions of international organizations, and the laws of nations clearly show that international law now prohibits capital punishment of persons who commit crimes while under the age of 18. Thus, widely ratified human rights treaties, resolutions of international organizations, and the practice of nations provide compelling evidence that the imposition of the death penalty upon juvenile offenders rises to the level of a customary rule of international law.

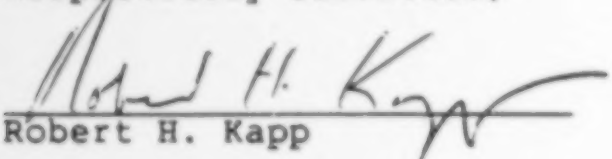
CONCLUSION

Based on the foregoing, this Court should invalidate the death penalty statutes of Georgia and Missouri which

^{25/} See supra Part I.C., pp. 19-33.

permit the execution of persons for crimes committed prior to age 18 as violations of international law and the Eighth Amendment to the Constitution.

Respectfully submitted,


Robert H. Kapp

Robert H. Kapp*
Larry Garber
International Human
Rights Law Group

733 - 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 639-8016

Thomas S. Williamson, Jr.
Mary Ellen O'Connell
Covington & Burling
1201 Pennsylvania Ave., N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

* Counsel of Record

Attorneys for Amicus Curiae
International Human Rights Law Group

No. 87-5666/87-6026

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER ZANT, Warden,

Respondent.

HEATH A. WILKINS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND
THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR AMICUS CURIAE DEFENSE FOR CHILDREN INTERNATIONAL - USA

DEFENSE FOR CHILDREN
INTERNATIONAL
1, rue de Verambe
Case postale 88
CH-1211 Geneva 20
Switzerland

INTERNATIONAL CATHOLIC
CHILD BUREAU, INC.
323 East 47th Street
New York, New York 10017

ANNA MAMALAKIS PAPPAS
*Counsel of Record
for Amicus Curiae*
233 Broadway
Suite 3700
New York, New York 10279
(212) 406-9400

DEFENSE FOR CHILDREN
INTERNATIONAL-USA
210 Forsyth Street
New York, New York 10002
(212) 353-0951

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No. 87-5666

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JOSE MARTINEZ HIGH,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

No. 87-6026

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Missouri

BRIEF FOR AMICUS CURIAE

DEFENSE FOR CHILDREN INTERNATIONAL-USA

INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Defense for Children International-USA (DCI-USA), with and on behalf of Defence for Children International (DCI), whose mandate is to ensure the worldwide promotion and protection of the internationally recognized principles of the United Nations Declaration of the Rights of the Child. DCI is a non-governmental organization (NGO) founded in Geneva, Switzerland in 1979 as one of the initiatives of the International Year of the Child, with individual members, affiliates and supporters in more than 57 countries, and national sections in 17 countries. DCI-USA is the United States section of the movement with local chapters in New York City, New York, New England, Pennsylvania, North Carolina and Florida. It has individual members, supporters and affiliates in more than 30 states.

DCI is in consultative status with the United Nations Economic and Social Council and with UNICEF; has served as the elected Secretariat of the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child since 1983; works closely with the United Nations Commission on Human Rights Open Ended Working Group on the Convention; and acts as the convenor of the NGO working party to draft the United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty.

DCI-USA is a member of the National Coalition Against the Death Penalty and of the United Nations NGO Committee on Human Rights; and acts as consultant to UNICEF on the International Rights of the Child.

ARGUMENT

I

NOT ONLY CONTEMPORARY STANDARDS IN THE UNITED STATES AS A WHOLE, BUT ALSO INTERNATIONAL NORMS AND PRACTICES OF OTHER NATIONS, SUPPORT THE CONCLUSION THAT IMPOSITION OF THE DEATH PENALTY FOR CRIMES COMMITTED BY JUVENILES CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THIS NATION'S CONSTITUTION.

In drawing the line at the age of sixteen with regard to the question of the constitutional permissibility of juvenile executions, the plurality of the Court in Thompson v. Oklahoma [hereinafter "Thompson"] expressly recognized (56 U.S.L.W. at 4896)¹

¹ It is indeed disheartening that the dissent in Thompson (56 U.S.L.W. at 4907 n.4) so offhandedly dismissed the relevance of international norms even in the limited context of interpreting the Eighth Amendment. Was it really meant to suggest that this Court can altogether dismiss the very existence of international human rights law, when the United States itself, and all official international bodies, including the International Court of Justice, have long proclaimed its ascendancy? To take the example used by the dissent to its untenable ultimate conclusion, it would not be of constitutional relevance even if the United States were at some point in time to be the only nation in the world imposing the death

that, in assessing the Eighth Amendment's proscription of cruel and unusual punishment, this Court must look not only to prevailing

penalty, or for that matter, the only nation in the globe inflicting such a penalty on juveniles. As shown below in this brief, the execution of juveniles involves international norms of legal, even jus cogens, stature, which are binding on the United States under both international treaty law and international customary law, let alone being relevant in assessing the reach of the Eighth Amendment. Suffice it to state here that, as more fully discussed below, the United States has ratified and voted for, respectively, two global international treaties which outlaw juvenile executions. One has been ratified by virtually all nations, and the other was adopted unanimously by the United Nations and has so far been ratified by 87 countries. Not only did the United States vote for this covenant at the time of its adoption but it subsequently supported a resolution of the U.N. General Assembly proclaiming the binding force on all U.N. members of the covenant's prohibition against juvenile executions. Moreover, the United States is legally bound by the Charter of the United Nations, the constitution of the international community, to promote human rights in cooperation with that world body. By reneging on a legal norm of the United Nations, the United States violates international constitutional law binding on it.

The thesis posed by the dissent in Thompson can be carried to dangerous extremes. It can be used, one dare say, to support any sort of unconscionable state conduct so long as it is

standards, practices and attitudes within the United States, but also to those obtaining in the international community. This is the clear mandate flowing from, e.g., Weems v. U.S., 217 U.S. 349, 378 (1910); Trop v. Dulles, 356 U.S. 86, 101 (1958); Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977); Edmund v. Florida, 458 U.S. 782, 796, n. 22 (1982).

DCI shares the view supported by the plurality in Thompson that, through the laws of most states of the Union² declarations of

supported by majorities whose blind passions and prejudices of the day might be kindled and exploited by official demagoguery. It is common knowledge that the United States itself and the international community as a whole, in the Nuremberg principles, have long rejected such an approach.

² Fourteen states plus the District of Columbia have no valid capital punishment statutes. Of the rest, twelve states directly establish the age of eighteen as the minimum age for execution (thus a majority of twenty-seven jurisdictions does not allow the execution of juveniles below eighteen); three set the age at seventeen; three have it at sixteen. Thompson, 56 U.S.L.W. at 4895, 4902.

authoritative bodies,³ and the extreme paucity of actual executions of juveniles throughout its history⁴ the American society as a whole has amply demonstrated its aversion to the phenomenon, leading to the conclusion that it deems it cruel and unusual punishment and thus spelling its constitutional doom under the rationale of the above cited cases.

In particular (conceding arguendo that the death penalty itself is constitutionally permissible, to begin with), the age limit of eighteen marks the ultimate threshold that must be crossed if imposition of capital punishment on a young person is to pass

³Thompson, 56 U.S.L.W. at 4896. See also National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code 3603 (1971); National Council of Juvenile and Family Court Judges, Resolution 2 (July 14, 1988).

⁴Thompson, 56 U.S.L.W. at 4897. See also W. Bowers, Legal Homicide 54(1984); V. Streib, Death Penalty for Juveniles 191-208 (1987); NAACP Legal Defense Fund, Death Row, U.S.A. 1 (May 1, 1988).

constitutional muster, even if one only takes into account the American experience. Not only is that age limit prevalent in the relevant statutes of the individual states (see supra note 2), but persons under eighteen actually executed in the United States account for only about 2% of all executions in the history of the nation (see supra note 4). Of these, the six executed from 1960 to now all were seventeen at the time of commission of their respective crimes,⁵ which comes so close to the eighteen age limit (seventeen is the age limit, furthermore, prescribed by only three United States jurisdictions⁶) as to warrant the assimilation of the two.

⁵V. Streib, Testimony on the Death Penalty for Juveniles (offered to the Subcommittee on Criminal Justice regarding House Bill 343, 99th Cong., June 5, 1986) (mimeo). See also V. Streib, Persons Executed for Crimes Committed While Under Age Eighteen (July 15, 1986) (unpublished memorandum).

⁶See supra note 2.

Eighteen, moreover, is the age at which laws in the United States recognize or accord certain faculties, prerogatives and rights to young persons. The age of civil majority in all jurisdictions of the Union stands at eighteen or over.⁷ At that age persons have the right to vote in federal elections (prior to 1971, before eighteen-year olds were granted the right to vote, the age of majority in most states was in fact twenty-one); enlist in the armed forces, that is risk death in defense of their country, without parental consent (they can enlist with parental consent at seventeen); and marry without parental consent, according to the laws of most of the states.⁸ Most states also show solicitude for the young by requiring them to be either

⁷Petitioner's Brief, Appendix A; M. Soler, et al., Legal Rights of Children in the United States of America, in 2 Law and the Status of the Child 683 (A. Mamalakis Pappas ed. 1983) [hereinafter "Soler"]

⁸Soler, supra note 7, at 683-684.

eighteen or twenty-one before they can consume alcoholic beverages.⁹ And, of course, the laws protect persons below the age of civil majority by not giving them the unfettered right to enter into contracts (if they do, their contracts are voidable at their option).¹⁰

These examples make a compelling case for outlawing executions of those who have not attained at least the age of eighteen at the time of the punishable offense. They, indeed, stand in sharp contrast to the specter on the other hand of state-sanctioned killing of the very same young persons, in the very same country, for crimes committed before they have attained the level of maturity and capacity for independent and reasoned action that the civil law uniformly demands. Any semblance of

⁹Id. at 684-685.

¹⁰Id. at 713. The age of majority is eighteen or over according to the laws of all states. See supra text accompanying note 7.

rationality in penal statutes, such as the ones now in question before this Court, is eclipsed in the context of the broader American landscape; and their arbitrariness, inequity and ultimate cruelty and inhumanity offend the conscience. Devoid of rationality, such laws, dealing as they do with a final and irrevocable outcome, with the deliberate unalterable destruction of human beings, and, as the plurality in Thompson recognized (56 U.S.L.W. at 4898), serving no legitimate goals of punishment or other substantial interest of the State, must not be sanctioned by this Court.

A rational uniform minimum standard¹¹ is needed in this nation to govern this most

¹¹The dissenting opinion in Thompson (56 U.S.L.W. at 4908), recognizes that "at some age a line does exist"; and even concedes that there is a general "reduction in willingness to impose capital punishment" (*id.* at 4907). That line should be drawn at eighteen, being as it is there where the overwhelming majority of all indicators converge.

fundamental issue of human rights and human dignity across the entire land. (And eighteen is the minimum age limit for which a legal foundation can be laid just from legal building blocks found within these shores, as posited above.) The grave issue of life or death should not be left to the vagaries of the uninformed opinions, local prejudices and parochial passions of the day, and to fortuitous circumstances of time and place, particularly where it concerns the young who are supposed to be the wards of society. (This issue patently is not on an equal footing with most of the matters left to the states for regulation in our federal system.) Allowing the status quo to continue would let stand the incoherent, checkered legal tableau which the Inter-American Commission of Human Rights only recently, in the case of James Terry Roach and Jay Pinkerton [hereinafter "Roach"], held "results in the arbitrary deprivation of life and inequality before the

law" and contravenes the American Declaration of the Rights and Duties of Man.¹²

The case for fixing on age eighteen as the threshold limit, however, becomes even more compelling and overwhelming when one factors into the Eighth Amendment analysis (as one must, as noted above) the inter-State comparative and international perspectives.

The abundant evidence of national practices across the globe and norms of international law opposed to the execution of juveniles, laid out in the companion briefs and under Point II below, need not be reiterated here. Such evidence must at least be used to inform this Court's interpretation of the Eighth Amendment. And, for purposes of this concrete task of construction alone, the Court need not necessarily reach the conclusion that the norms in question are

¹²Resolution No. 3/87, Case 9647 (United States), OEA/Ser. L/V/II.69, Doc.17, p. 39, para. 61 and p. 40 (27 March 1987).

sufficiently crystallized or legally binding on the United States (though on the basis of a fortiori reasoning the weight to be given such evidence, even just in the context of Eighth Amendment analysis, increases in proportion to its quantitative and qualitative strength, culminating in its having a conclusive bearing if it shows the existence of settled norms of international law).

DCI, however, firmly endorses the view that this Court confronts and need pass upon a second contention that it poses in tandem with other amici: that execution of youths below the age of eighteen at the time of commission of the crime is unquestionably prohibited by international law, law to which the United States is clearly subject and which this Court is competent and duty-bound to uphold and apply.

II

INTERNATIONAL LAW, INCLUDING CONVENTIONAL (TREATY) AND CUSTOMARY GLOBAL LAW, BINDING ON THE UNITED STATES PROSCRIBES IMPOSITION OF THE DEATH PENALTY ON PERSONS YOUNGER THAN EIGHTEEN AT THE TIME OF COMMISSION OF THE OFFENSE, AND THIS COURT IS DUTY-BOUND UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION TO INVALIDATE CONTRAVENING LAWS AND PRACTICES OF THE STATES OF THE UNION.

In support of this contention, DCI will avoid burdening the Court with unnecessary repetition of matter contained in companion briefs, with all of which it concurs. Instead emphasis will be placed on supplementary arguments, which should help give an exposition of the fuller dimension of this aspect.

A. The Source and Nature of International Law

Article 38(1) of the Statute of the International Court of Justice sets forth the subject-matter jurisdiction of the Court and, in effect, defines the substantive content of international law. It lists, inter alia, treaties, international custom and general

principles of law recognized by civilized nations.¹³ As regards treaties, of course, the Statute embodies the old rule of pacta sunt servanda, which proclaims the binding

¹³It reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

force of treaty stipulations vis-a-vis States parties.¹⁴

The other sources of transnational law, however, are not as clear-cut. The Inter-American Commission on Human Rights in Roach (see supra note 12) listed the following elements of customary norms of international law: "(a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b) a continuation or repetition of the practice over a considerable period of time; (c) a conviction that the practice is required by or consistent with prevailing international law; and (d) general acquiescence in the practice by other states."¹⁵

¹⁴This rule was codified in Article 26 of the Vienna Convention on the Law of Treaties, U.N. Doc A/CONF. 39/27 (1969), reprinted in 8 I.L.M. 679 (1969) [hereinafter "Vienna Convention"].

¹⁵Supra note 12, at 31, citing II

As this definition indicates, it has never been the view that anything approaching unanimity or even majority participation in the relevant practice of States is necessary. The quantum of practice needed would logically vary inversely according to the quantitative and qualitative weight contributed by the other constitutive elements of the custom referable to any particular norm.

The subjective element mentioned in the quoted definition, known as opinio juris, appears to be losing ground as a strict requirement when it comes to practice that patently has substantial legal content. As early as 1969, Judge Lachs of the International Court of Justice stated, in the North Sea Continental Shelf Cases, that the "general practice of States should be

International Law Commission Y.B., 1950, p. 26, para. 11.

recognized as prima facie evidence that it is accepted as law."¹⁶

Dissenting States cannot defeat a customary rule of international law if, in spite of their dissent, a sufficient degree of generality of practice is achieved (acquiescence by some "other States" not by all other States, or the other States, is necessary). Whether a dissenting State itself can be held bound by the rule hinges on its being able to "show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence."¹⁷

¹⁶Quoted in Henkin, Pugh, Schachter and Smit, *International Law, Cases and Materials* 65 (2d ed. 1980) [hereinafter "Henkin"].

¹⁷M. Akehurst, *A Modern Introduction to International Law* 32 (4th ed. 1982). The author points to the adverb "always" used by the International Court of Justice in the Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116, 131. Another authority on the subject has posited that the International Court of Justice "has never yet treated [litigants'] acceptance of the practice [in question] as a sine qua non of applying the custom to them."

In addition to custom, international law, according to the International Court's Statute, encompasses general principles of law recognized by civilized nations. "Civilized" in this context naturally refers to those well governed nations extending progressive, enlightened and humane treatment to their citizens and others.

In his dissenting opinion in the South West Africa Cases, Judge Tanaka of the International Court discussed the implications of this provision of the Court's Statute vis-a-vis human rights and observed that such rights "are not the product of a particular juridical system...but the same

Waldock, General Course on Public International Law, 2 Recueil des Cours 1, 50 (1962), reprinted in Henkin, supra note 16, at 67. In the North Sea Continental Shelf Cases, the International Court of Justice stated in dictum that "general or customary law rules and obligations..., by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favor." 1969 I.C.J. 38-39.

human rights must be...protected everywhere man goes....Only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and coordination." Application of Article 38(1)(c), therefore, is not limited "to a strict analogical extension of certain principles of municipal law." Taking the view that human rights are grounded in natural law and are part of the jus cogens, he concluded that, by the very nature of human rights, and by the very nature and purpose of Article 38(1)(c), consent of the States is not required as a condition precedent to the formation of an international rule through the operation of this provision of the Statute. Further he opined that recognition by all the civilized States is not required, nor that the recognition take the form of an official act.¹⁸

¹⁸1966 I.C.J. 296-300. See also the separate opinion of Judge Ammoun in Barcelona

In the case of fundamental human rights, therefore, the normative process has an additional dimension. Such rights are rooted in the "conscience and reason of mankind through the ages,"¹⁸ and are sui generis when compared with the traditional transnational norms of old. They, therefore, warrant special jurisprudential accommodation. For one, human rights precepts are more readily amenable to classification, at one and the same time, as rules evolving through the practice of States on the global plane (international customary norms) and also as "general principles of law recognized by civilized nations." When this duality is there, it logically follows that less weight need be placed on the scale when weighing normative content pursuant to just one of the

Traction, infra note 20 at 302-06.

¹⁹See dissenting opinion of Judge Tanaka in the South West Africa Cases, supra note 18.

two formulas inherent in those two categories of substantive international law.

Secondly, there is a certain logical inconsistency in an insistence on strict positivist requirements of State auto-limitation with regard to the formation of basic international human rights law. The International Court of Justice has noted that obligations of States "concerning the basic rights of the human person" are obligations "towards the international community as a whole....By their very nature...[they] are the concern of all states...they are obligations erga omnes."²⁰ It has also stated in regard to the Genocide Convention that "in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest.... Consequently, one cannot speak

²⁰Barcelona Traction Light and Power Co., Ltd., 1970 I.C.J. 1, 32.

of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."²¹

From the point of view of international law, a State indeed acts in the international arena primarily as a custodian of its national interests, and those interests may not necessarily coincide, or be compatible with, the interests of other States. In the case of fundamental human rights, however, international law is not confronted with conflicting interests of particular groups, but with the common interests of all human beings. Therefore, conceptions about

²¹Reservations to the Convention on Genocide, 1951 I.C.J. 15, 23; See also Inter-American Court of Human Rights, Advisory Opinion OC-2/82, September 24, 1982, para. 29; European Commission on Human Rights, Application No. 788/60, 4 European Y.B. of Human Rights, 116, 140 (1961).

Divergence of views regarding the best mode of observance of some human rights is to be differentiated from dissonance as to the

reciprocal exchange of commitments among States and notions that the inter-state bargain that underlies an international norm falls, if not faithfully lived up to by the parties in intrastate practice, are not quite relevant, or as relevant, to the formation of international law relating to the elemental rights of the human person.²² And when it comes to assessing practice and opinio juris of particular States in this domain, their behavior and pronouncements need be held up to exacting standards of good faith and

core content of such rights when it comes to the question of a consensual balance.

²²See Schachter, Crisis of Legitimation in the United Nations, 50 Nordisk Tidsskrift For International Ret 3, 33 (1982) and Henkin, Introduction, in The International Bill of Rights: The International Covenant on Civil and Political Rights 1,8 (L. Henkin, ed. (1984) [hereinafter "Henkin, ed."], where the authors voice a view in a similar vein. See also Filartiga v. Pena-Irala, 630 F. 2 876, 884 n. 15 (2d Cir. 1980), where the Court stated that widespread contravention of the international customary norm prohibiting torture did not negate its legal force.

subjected to rules of strict accountability.²³

Underlying these propositions is the fact that the jurisprudential underpinnings of human rights are central to the raison d'être of law itself. And human thought, legal theory, and philosophy as of the beginnings of civilization are permeated with the concept of the inherent and inalienable rights of man--from the Hellenic Stoics and Roman philosophers to St. Thomas Aquinas, Grotius (the father of international law), Locke, Paine, Milton and Blackstone, among others, as well as the American Declaration of Independence and the French Declaration of

²³See Nuclear Test Cases, 1974 I.C.J. 457, where the International Court of Justice held France to its word (unilateral-at-large statements of intention to cease nuclear testing in the Pacific). See also Franck, Word Made Law: The Decision of the ICJ in the Nuclear Test Cases, 69 Am. J. Int'l L. 612, 619 (1975).

the Rights of Man and Citizen.²⁴ (This concept has found recognition in the United Nations Charter and Universal Declaration of Human Rights,²⁵ which take for granted the pre-existence of universal human rights.²⁶) It is these jurisprudential credentials (tradition; pre-eminence; fundamental,

²⁴See generally H. Lauterpach, An International Bill of the Rights of Man 18-64 (1945); F. Castberg, Natural Law and Human Rights: An Idea-Historical Survey, in International Protection of Human Rights: Proceedings of the 7th Nobel Symposium 13-29 (Eide and Schou eds. 1967).

²⁵G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (December 10, 1948) Preamble and Art. 1 [hereinafter "Universal Declaration"].

²⁶See supra text accompanying note 18 for Judge Tanaka's view that human rights are based on natural law. In the same opinion Judge Tanaka pointed out that "the Charter presupposes the existence of human rights and freedoms which shall be respected; the existence of such rights and freedoms is unthinkable without corresponding obligations...and a legal norm underlying them. Furthermore, there is no doubt that these obligations...also have a legal character by the very nature of the subject matter." 1966 I.C.J. 289-290. See U.N. Charter, Arts. 1(3), 55(c).

ontological and transcendent nature on all levels and planes of human society and governance; and versatility when it comes to the subject-matter jurisdiction of the International court) that ensure to human rights speedier and smoother passage across the international juridical threshold.

Furthermore, there is strong evidence that at least the more fundamental human rights are to be considered norms of jus cogens. The concept of jus cogens has been codified in the Vienna Convention.²⁷ It is apparent from the wording of the Article (supra note 27) that acceptance by all States

²⁷See Vienna Convention, supra note 14, Article 53, which reads: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

is not necessary to the establishment of a norm of jus cogens. As the text clearly shows, jus cogens norms are absolute, imperative norms that cannot be derogated from by any member of the international community. This is true even of States which might have consistently opposed them.²⁸

The Commentary of the International Law Commission to the draft articles of the Vienna Convention states that, before it was decided not to include in this article examples of some of "the most obvious and best settled rules of jus cogens," human rights norms were among the examples contemplated for listing.²⁹ In the South West African Cases,

²⁸This was acknowledged recently by the Inter-American Commission on Human Rights in Roach, supra note 12, at 33. The Commission, moreover, found that in "the OAS there is recognized a norm of jus cogens which prohibits the State execution of children." Id. at 36.

²⁹Documents of the Conference on the Law of Treaties 1968-1969, U.N. Doc. A/CONF. 39/1/Add.2, at 7 and 68 (emphasis added).

Judge Tanaka of the International Court expressed the view that human rights are part of the jus cogens (see supra text accompanying note 18); and the same Court, in Barcelona Traction, referred to obligations of States "concerning the basic rights of the human person" as "obligations erga omnes (see supra text accompany note 20). The Inter-American Commission on Human Rights in Roach posed, but did not address, the question of whether this language "is intended to mean that all codified human rights provisions contained in international treaties are embraced by the concept of jus cogens" (supra note 12, at 35-36). Certainly, however, the right to life qualifies as a "basic right of the human person," even had it not been repeatedly affirmed in international instruments.

B. Supremacy of International Law over
Laws and Practices of the
Individual States of the Union

The international agreements which forbid the execution of juveniles are clearly self-executing in view of the immediacy and the imperative tone reflected in their respective texts (and even in case of some doubt, the settled rule is that a treaty is presumed to be self-executing).³⁰ Courts in the United States are bound to apply stipulations in self-executing treaties, as well as norms of customary international law,³¹ and to invalidate contravening laws or actions of state or local governments under the Supremacy Clause, Article VI, Clause 2, of the United States Constitution.³² Ware v.

³⁰See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 131 (T.D. No. 6, Vol. 2, April 12, 1985).

³¹Id.

³²See also U.S. Constitution, Art. I, Sec. 8, Clause 10, which reflects recognition of federal supremacy over issues involving the "Law of Nations."

Hylton, 3 Dall. 199, 236-237 (U.S. 1796); Baker v. Carr, 369 U.S. 186, 212 (1962); The Paquete Habana, 175 U.S. 677 (1900).³³ This brief will next list the treaty and customary international law norms that are binding on the United States and which forbid the execution of youth below the age of eighteen at the time of the offense for which death is sought to be imposed.³⁴

C. Treaty Stipulations, and Other
Provisions Qualifying as
Conventional Rules, Binding on the
United States, by Reason of Which
Execution for Crimes of Juveniles
Under Eighteen is Prohibited.

The arguments under this rubric are to be distinguished from the argument that the

³³See also Oyama v. California, 332 U.S. 633, 649-650 (1948); First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 622-623 (1923); Filartiga v. Pena-Irala, 630 F.2d 876, 880-890 (2d Cir. 1980); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385-1390 (10th Cir. 1981).

³⁴"For purposes...of liability to capital punishment, the age of the offender is universally determined as that of the date of the commission of the crime, not of the date

United States is bound under customary international law, as codified in Article 18 of the Vienna Convention (see supra note 14), to refrain from acts which would defeat the object and purpose of treaties prohibiting the execution of juveniles that it has signed but not yet ratified. This valid argument has received full treatment in the companion briefs and need not be reiterated.

Instead, emphasis will be placed on provisions fully binding on the United States as conventional rules (not just on an interim basis or as a stopgap measure, albeit of indefinite duration). The most obvious examples of these by now are the Charter of the Organization of American States³⁵ as amended by the 1967 Protocol of Buenos

of the trial or punishment." U.N. Department of Economic and Social Affairs, Capital Punishment: Developments 1961-1965, U.N. Doc. ST/SOA/SD/10, at p. 14, para. 45 (1967).

³⁵₂ U.S.T. 2394, T.I.A.S. No. 2361 (entered into force December 13, 1951).

Aires,³⁶ on the basis of which, through subsequent acceptance (as affirmed in Roach, supra note 12, at 30), the American Declaration of the Rights and Duties of Man³⁷ became binding; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Article 68).³⁸

The American Declaration of the Rights and Duties of Man provides in relevant parts that "[e]very human being has the right to life, liberty and the security of his person" (Article I); that all have the right to equality before the law (Article II); that "all children have the right to special protection, care and aid" (Article VII); and

³⁶T.I.A.S. No. 6847, O.A.S.T.S. No. 1-A, O.A.S.O.R., O.E.A./Ser. A/2, Add. 2 (entered into force February 27, 1970).

³⁷O.A.S. Res. XXX, 1948, O.A.S.O.R. O.E.A./Ser. L/V/1.4, Rev. (1965).

³⁸₆ U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

proscribes "cruel, infamous or unusual punishment" (Article XXVI). In Roach (supra note 12, at 40), the Inter-American Commission on Human Rights found that the execution of the juveniles Roach and Pinkerton for crimes committed while under the age of eighteen violated Articles I (right to life) and II (right to equality before the law) of the American Declaration. The Commission held that in "the OAS there is a...norm of jus cogens which prohibits the State execution of children" (supra note 12, at 36).

As for the Geneva Convention, which explicitly prohibits execution of juveniles under the age of eighteen at the time of the offense (supra note 38, Article 68), and which is ratified by 165 States, including the United States, it cannot be denied that it establishes a treaty rule binding a fortiori in peace time as well, in view of the fact that it is indeed during times of war or

national emergency only when treaties and general international law allow derogation, if at all (the prohibition against execution of juveniles is non-derogable), from human rights norms.

Over and above these instruments, however, the United States is bound by the Charter of the United Nations, which proclaims "the dignity and worth of the human person" (Preamble); establishes the "promot[ion]" of "universal respect for, and observance of, human rights" as one of its purposes (Articles 1, 55(c); and "pledge[s]" all Member States "to take joint and separate action in cooperation with the organization for the achievement" of this and its other purposes (Articles 55(c), 56). It is now settled that, by virtue of these provisions, the Charter imposes legal obligations on Member States to severally and jointly

respect and promote human rights.³⁹ Surely, promotion of human rights means pushing forward and expanding the protection of the human person, not going back or reneging on norms already established. The United States, therefore, will not be faithful to its legal pledge to promote human rights⁴⁰ if a repudiation of its commitment under the Geneva Convention of 1949, through acquiescence to the enforcement of statutes

³⁹See Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57; Montreal Statement of the Assembly for Human Rights of March 27, 1968, reprinted in 9(1) J. Int'l. Comm'n of Jurists 94; Schwelb, The International Court of Justice and the Human Rights Clauses of the Charter, 66 Am. J. Int'l L. 337, 341-350 (1972); Sohn, The Human Rights Law of the Charter, 12 Tex. Int'l L.J. 129, 131 (1977).

⁴⁰See generally, Schachter, The Charter and the Constitution: The Human Rights Provisions in American Law, 4 Vand. L. Rev. 643 (1951).

such as the one now before this Court, is allowed to stand.⁴¹

It is in pursuance of the Charter's mandate on human rights, moreover, that the United Nations has elaborated the many human rights instruments currently in existence.⁴² Foremost is the Universal Declaration of Human Rights (supra note 25) (that the United States took the lead in elaborating, voted for, and has invoked against other nations), which is now looked upon as the ius constituendum of the Charter⁴³ with regard to

⁴¹As the Inter-American Commission on Human Rights has observed, "human rights...always represent progress with respect to the preservation of human dignity and never a regression to situations that were regarded as having been overcome." IACHR, Annual Report, 1982-1983, OEA/Ser. L/V/II/61 Doc. 22, Rev. 1, at 159 (1983).

⁴²See UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev. 1 (1978). Their preambles invariably make reference to the Charter.

⁴³The wording of its Preamble makes its direct link to the Charter abundantly clear.

the term "human rights" and as part of international law.⁴⁴ The Declaration affirms the "inherent dignity and worth of the human person" (Preamble, Article 1); the right of everyone to "life, liberty and security of person," set out in unqualified terms (Article 3); the right to freedom from "torture or cruel, inhuman or degrading treatment or punishment" (Article 5); the

⁴⁴That is the position taken with regard to at least the civil rights enunciated in the Declaration. It is based on the provisions of Article 38 of the Statute of the International Court of Justice (supra note 13). It is supported by either one, or both, of the following propositions: (1) most, if not all, of the principles enshrined in the Declaration are "general principles of law recognized by civilized nations"; and (2) by subsequent "general practice accepted as law," not only has a customary rule of international law emerged whereby the Declaration has become accepted as an authoritative interpretation of the Charter provisions on human rights, and is as such binding on all member States of the United Nations (see supra note 39 and accompanying text), but moreover by reason of "general practice," the Declaration has also become part of general customary international law independent of the Charter, and thus binding on all Member States alike. See e.g.,

right to equality before the law and equal protection of the law (Article 7); and that "childhood [is] entitled to special care" (Article 25(1)).

These are provisions comparable to those of the American Declaration on the basis of

Humphrey The Universal Declaration of Human Rights: Its History, Impact and Juridical Character, in Human Rights: Thirty Years After The Universal Declaration, 27-37 (B.G. Ramcharan ed. 1979). In the Declaration of Teheran, the official International Conference on Human Rights (April-May 1968) also set forth the conclusion that the Universal Declaration "constitutes an obligation for the members of the international community." U.N. Doc. A/CONF. 32/41, at 4. In December of 1968, the General Assembly endorsed the Declaration of Teheran. G.A. Res. 2442 (XXII), 23 U.N. GAOR, Supp. No. 18, U.N. Doc. A/7218, at 49. See also the separate opinion of Judge Ammoun in Barcelona Traction, supra note 18; and the article by Judge Lachs, The Law in and of the United Nations, 1 Ind. J. of Int'l L. 1960-61, at 429, 437-442. This view is shared even by the positivist Russian school of international law. See Tunkin, The Legal Nature of the United Nations, 3 Recueil des Cours 7, 32-37 (1966). The same view was expressed officially by then United States Secretary of State Henry Kissinger. See E. McDowell, Digest of United States Practice in International Law 1976, at 138 (Dept. of State Publication, 1977).

which the Inter-American Commission on Human Rights held adversely to the United States after finding that, by subsequent acceptance, that Declaration had acquired the binding force of conventional law (see supra, text following note 38 and text accompanying notes 35-37). By the same token, the Universal Declaration has, by subsequent acceptance, become an obligatory instrument. Therefore, by the same reasoning, its own affirmation of the right to life and equality before the law, coupled with the other provisions singled out above, operates, through the mandate of the Charter, to impose an obligation on the United States not to execute juvenile offenders.

Moreover, all the provisions of the Universal Declaration have by now been incorporated into several binding international (as well as regional) agreements, in addition to solemn declarations, by the General Assembly and other organs. These concretize, amplify and elaborate the norms set forth in

broader terms in the Universal Declaration and consistently make specific reference to the latter in their preambles.⁴⁵ The International Covenant on Civil and Political Rights, adopted unanimously by the General Assembly (including the United States) in 1966,⁴⁶ is the foremost. Its Preamble clearly links it to the Charter and the Declaration and affirms "recognition of the inherent dignity" of all persons (see also Article 10). Article 6(5), which forbids execution of

⁴⁵This aspect is factored into the equation which makes for the conclusion that, through international practice, the Declaration is recognized as laying down binding norms. Additionally, the Declaration has not only been invoked against States, but been cited and recited in a plethora of important resolutions of the General Assembly of the United Nations, often in mandatory terms and on an equal footing with the Charter. See e.g., G.A. Res. 1514 (XV, 15 U.N. GAOR, Supp. No. 16 at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1904 (XVIII), 18 U.N. GAOR, Supp. No. 16, at 35, U.N. Doc.A/5515 (1963).

⁴⁶G.A. Res. 2200 (XIX), 21 U.N. GAOR, Supp. No. 16, at 52-58, U.N. Doc. A/6316 (1966) [hereinafter Covenant"].

youth under eighteen at the time of the offense, opens with an affirmation of "the inherent right to life," calls for restriction of the death penalty, and contains an indirect appeal for its total abolition.⁴⁷ It is apparent, therefore, that the limitations the Covenant places on executions represent the maximum concessions to retentionist States. (It need not be pointed out to this Court that limitations on rights affirmed in sweeping and emphatic terms in instruments of constitutional import are to be strictly construed.) Thus, the age limit of eighteen is to be looked upon as the absolute minimum that the Covenant countenances. This is also borne out by the

⁴⁷The Human Rights Committee established under the Covenant to monitor its implementation has stated that the "article also refers generally to abolition in terms which strongly suggest that abolition is desirable." U.N. Doc. A/37/40, pp. 93-94, para. 6 (1982). In fact, the United Nations Commission on Human Rights is currently at work on a protocol to the Covenant for the abolition of the death penalty.

travaux preparatoires, as shall be also noted below.

In view of the link between the Covenant and the Universal Declaration, Article 6(5) of the former is a reliable guide to inform the interpretation of the "right to life" provision in the latter.⁴⁸ The Covenant provision can, also, according to the Vienna Convention (see supra note 14, Article 31(3)), be used to authoritatively interpret the Universal Declaration by being viewed as a "subsequent agreement between the parties," a "subsequent practice in the application" of the Declaration, and/or as "relevant rules of international law."

The Covenant (like the Universal Declaration) also proscribes "cruel, inhuman

⁴⁸In the Namibia opinion, the International Court of Justice stressed that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation." See supra note 39, at 31.

or degrading treatment or punishment" (Article 7) and affirms the right to equality before the law and equal protection of the law (Article 26). It, moreover, also specifies that the "penitentiary system shall comprise treatment...the essential aim of which shall be...reformation and social rehabilitation," with juvenile offenders "segregated from adults and...accorded treatment appropriate to their age and legal status" (Article 10(3)); that in the case of juveniles "the [penal] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation" (Article 14(4)); and that "[e]very child shall have...the right to such measures of protection as required by his status as a minor, on the part of...the State" (Article 24(1)). Thus, the two instruments display a unity of design and purpose, which entitles the latter of the two to be viewed as an interpretational extension of the first. Since the Universal Declaration is binding on

all Member States as the authoritative interpretation of their obligations under the Charter relative to human rights,⁴⁹ by process of legitimate teleological interpretation, Article 6(5) is likewise binding on the Member States, regardless of whether or not it was when adopted declarative of customary international law or whether or not it has, since then, acquired the status of an international customary rule.

This is not an attenuated way of imposing norms on States, inasmuch as both Article 6(5) and 7 of the Covenant (the most relevant here) allow of no derogation (even in emergency). This signifies that the norms they embody lie at the core of the human rights mandate of the Charter; that they necessarily and properly flow from the Charter's matrix of international human rights law. (It is not suggested that the thesis posited above would

⁴⁹See supra notes 43-44 and accompanying text.

apply to rights which do not fit this description.)

It might be argued that since the United States upon ratification of the Covenant can make a reservation to Article 6(5), it cannot be held bound by it as a conventional rule.⁵⁰ But as the Covenant makes no provision for reservations, the matter is governed by general rules of international law regulating the admissibility and legal effect of reservations.⁵¹ Accordingly, such a reservation would not be acceptable in view of its obvious incompatibility with the object and purpose of the treaty (Vienna Convention,

⁵⁰A reservation would be of no import if the Article is declaratory of customary law unless the reserving State has been a consistent ab initio objector. See supra note 17 and accompanying text.

⁵¹Principles enunciated in the Advisory Opinion on Reservations to the Convention on Genocide, 1951 I.C.J. 15 and codified in Articles 19-21 et seq. of the Vienna Convention (see supra notes 14, 21).

Article 19).⁵² The fact that the existing laws and practices of individual states of the United States do not happen to conform to the norm under discussion is to no avail. It is well settled that a nation may not plead its domestic laws as justification for failure to abide by a treaty, any more than for failure to observe rules of customary international law.⁵³

⁵²Id. See also Inter-American Court of Human Rights, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC - 3/83, September 8, 1983, para. 61: "a reservation...designed to enable a State to suspend any of the non-derogable...rights must be deemed to be incompatible with the purpose and object of the Convention and, consequently not permitted by it". According to information supplied by the United Nations Office of Legal Affairs, no reservations, indeed, to Article 6(5) have been entered by any of the 87 ratifying states.

⁵³See Schachter, "The Obligation to Implement the Covenant in Domestic Law," in Henkin, ed., supra note 22, at 311, 322.

D. The United States Is also Bound by International Customary Law, and International Law Deriving from Principles of Law Recognized by Civilized Nations, that Forbid Execution of Youth for Culpable Conduct While Under Eighteen

Besides the direct legal obligation imposed on it by the aforesaid conventional rules, the United States is bound by other (or the same but differently classified) rules of international law that regulate the issue (and this is so irrespective of whether it is also bound by any treaty qua treaty). In considering this aspect, the provisions in treaties and other international and regional instruments are again relevant, albeit from a different standpoint. Also relevant are the inter-State practices of States, as well as their internal laws and practices.

In addition to the stipulations in the Geneva Convention, the Universal Declaration, the American Declaration and the Covenant (see supra text accompanying notes 38-49), there are: a) The American Convention on Human

Rights (Article 4)⁵⁴; Protocol II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-international Armed Conflicts (Article 6(4)),⁵⁵ both of which have been signed by the United States and explicitly prohibit the execution of youths committing crimes when under eighteen; b) Protocol No. 6 to the European Convention on Human Rights⁵⁶ which abolishes capital punishment altogether; c) Draft Convention on the Rights of the Child, adopted by the

⁵⁴OASOR OEA/Ser. K/XVI/I.1, Doc. 65, Rev. 1, Corr. 2 (November 22, 1969) [hereinafter "American Convention"]. Its preamble links it to the Universal Declaration and it contains in Articles 5, 19 and 24 essentially the same provisions as the Covenant catalogued supra in text accompanying notes 46-47 and preceding note 49.

⁵⁵Submitted to the Senate on December 13, 1986 for ratification. Message from the President, 100 Cong., Treaty Doc. 100-2, 1987.

⁵⁶Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114.

Working Group on the Convention of the United Nations Commission on Human Rights, which prohibits capital punishment or life imprisonment for crimes committed by those under eighteen, as well as cruel, inhuman or degrading treatment (draft article 19(2)(a-b)).⁵⁷

Additionally, there is the United Nations Declaration of the Rights of the Child, unanimously adopted by the General Assembly.⁵⁸ Its preamble expressly relates it both to the United Nations Charter and the Universal Declaration; underscores that the child needs "special safeguards" and "legal protection"; and expressly reminds that the need for such special safeguards had been already affirmed in the Universal

⁵⁷See U.N. Doc. E/CN.4/1986/39, Appendix.

⁵⁸G.A. Res. 1386 (XIV), U.N. Doc. 4354, at 19 (November 20, 1959).

Declaration,⁵⁹ in the prior Geneva Declaration of the Rights of the Child of 1924⁶⁰ and in other instruments of global reach.⁶¹ The preamble, moreover, reiterates the principle enunciated in its progenitor⁶² that "mankind owes to the child the best it has to give." Among its ten operative principles, the Declaration states that the child "shall enjoy special protection"

⁵⁹Article 25 (1). See supra text following note 44.

⁶⁰The 1924 Declaration was adopted by the Assembly of the League of Nations and was based on the Charter of the International Union for Child Welfare. It was minimally revised in 1946 by the latter's General Council. It proclaimed, inter alia, that the "child must be protected" (Article 1 of the 1946 revision) and that "the maladjusted [child] must be re-educated (Articles 2 and 4, respectively, of the original and revised versions).

⁶¹See also the provisions of special relevance to children in the subsequently enacted Covenant, supra text accompanying notes 46-49.

⁶²Geneva Declaration of 1924, supra note 60 and accompanying text.

(Principle 2); and that the child "shall be protected against all forms of...cruelty" (Principle 9).

All United Nations sponsored human rights instruments are expressly linked to the Charter and the Universal Declaration of Human Rights.⁶³ Thus anyone of these cannot be viewed in isolation. Its juridical impact transcends its own structure. It is part of a larger organic whole, part of a constellation with unity of substance and purpose, meant to move along in unison on the international plateau of law. It has legal value beyond its own individual status as a treaty or a declaration. There is a reciprocity of influence among all of them; they feed upon

⁶³The draft preamble of the proposed Convention on the Right of the Child also refers to the Charter and the Universal Declaration as well as the Declarations of the Rights of the Child of 1959 and 1924. See supra note 57. The regional conventions likewise make reference to the Universal Declaration in their preambles.

each other and converge to produce a cumulative legal effect; and each must be viewed concordantly with the vision that inheres in the scheme to which it belongs.

The repeated affirmations in these instruments regarding the rights of children (right to special protection; right to freedom from "all forms of cruelty" and degrading treatment; right to equal protection of the laws; right to rehabilitation; and, of course, exemption from capital punishment), coupled with the evidence presented by Amicus Amnesty International⁶⁴ of formalized and customary refusal by the great majority of nations to impose death on persons under eighteen at the time of culpable conduct, clearly establish that the inadmissibility of such punishment is a principle of law recognized by civilized nations within the meaning of Article 38 of

⁶⁴Amnesty International, United States of America: The Death Penalty 74 (1987)

the Statute of the International Court of Justice. This is then an international legal norm binding on all members of the international community, regardless of whether or not they consent to it (even if the dissenters themselves generally qualify as civilized nations).⁶⁵

Additionally, the norm qualifies at one and the same time as a customary norm of international law. Because of its dual character in that respect (its eligibility under more than one test of normative maturation), it would have passed the juridical threshold on the strength of its combined credentials, even if each set of them by itself was of marginal merit.⁶⁶ Marginality, however, is by no means the case here, and there is no need to press this ex abundanti cautela argument. This is

⁶⁵ See supra note 44 and text accompanying note 18 for the opinion of Judge Tanaka of the International Court.

reinforced when one examines the norm also from the perspective of international customary law, bearing in mind that the evidence adduced along this route is equally germane simultaneously in polishing the norm's twin legal armor as a "principle of law recognized by civilized nations."

First, there is solid evidence that the norm belongs to the jus cogens genre. Every instrument which incorporates it admits of no derogation from it.⁶⁷ Thus it falls squarely

⁶⁶ See generally supra text accompanying notes 19-26.

⁶⁷ See Covenant, supra note 46, Art. 4(2). See also American Convention, supra note 54, Art. 27(2). Even the prohibition of the Covenant against not only cruel, but degrading, punishment or treatment is not derogable (see id), which illustrates by comparison the supreme importance of the norm against execution of juveniles. The American Convention (see id) additionally makes non-derogable not only the prohibition of cruel or degrading punishment or treatment (Article 5(2), but also "the right" of the child to such measures of protection as are required by his status as a minor (Article 24). See also Arts. 3-4 of Protocol No. 6 to the European Convention (see supra text accompanying note 56).

within the jus cogens definition of the Vienna Convention (see supra note 27), not to mention the various authoritative references to basic human rights norms as being jus cogens.²⁰ The United Nations Commission on Human Rights has, indeed, accepted the thesis that this and other non-derogable norms are inalienable and peremptory within the meaning of the Vienna Convention.²¹ By definition, of course, a jus cogens norm is binding on one and all, even dissenters (see supra note 27 and accompanying text). In view of the above, any further inquiry can be deemed foreclosed; there is no need to survey practices of States nor to examine the attitude of the United States with regard to any aspect of the matter.

²⁰See supra text accompanying and following note 29.

²¹See U.N. Doc. E/CN. 4/Sub. 2/1982/15, pp. 18-19, para. 67 et seq.

Assuming arguendo that the norm does not qualify as jus cogens, or even as a principle of law recognized by civilized nations, which is by no means conceded, its mere candidacy for these mantles adds a lot of extra weight to the proposition that it qualifies as a norm of customary international law. Even if one discounts the thesis that human rights norms more readily pass into the juridical mainstream (see supra text accompanying notes 19 to 26), the evidence is overwhelming that this particular norm has done so. A few of the applicable considerations merit emphasis.

A stipulation in a treaty is binding on non-parties if it is declaratory of a pre-existing norm of customary law or if it subsequently acquires the status of a customary rule (Vienna Convention, supra note 14, Article 38). The rule under discussion had been universally accepted in the Geneva Convention (supra note 38) for seventeen

years prior to the adoption of the Covenant (see supra text accompanying notes 46-49) (and had even pre-dated the Convention⁷⁰). The drafters of the Covenant took it as a given that execution of juveniles was a proscribed thing.⁷¹ The proscription was thus already a customary rule.

⁷⁰See III Final Record of the Diplomatic Conference of Geneva of 1949, Annexes, p. 131, Art. 59; International Committee of the Red Cross, Commentary, IV Geneva Convention, p. 347.

⁷¹The Working Group of the Committee of the General Assembly working on the Covenant (Third Committee), after considering a proposal that would exclude from the death penalty "children and young persons" (Japan), recommended to the Committee that it choose from among the following words: "minors," "juveniles," and "persons below eighteen." The Committee opted for the last as being the most succinct. Report of the Third Committee U.N. Doc. A/3764 (1957), 12 GAOR, Annexes, Agenda It. 33, pp. 10-11, paras. 93, 105. Prior to the vote the U.K. representative objected to the term "minors" as it "specifically meant persons under twenty-one." 12 GAOR, C.3/SR. 820, para. 3 (25 Nov. 1957). Other reasons for the choice made were that it was in harmony with the practices of most countries; was the prescription used in the Geneva Convention of 1949; and would impose an equal obligation on all States. Id.

The Covenant thereafter became widely ratified by nations representing all regions and legal systems (eighty seven nations so far and increasing each year), all unreservedly acceding to its Article 6(5) (see supra note 52).⁷² "[A] very widespread and representative participation in the convention [can] suffice of itself" to transform a treaty stipulation (a purely conventional rule) into a rule of customary law, "even without the passage of a considerable length of time." North Sea Continental Shelf Cases, 1969 I.C.J. 42. (The treaty by itself, under the circumstances provides the requisite elements

para. 21; id. SR. 812, para. 25; id. SR. 813, para. 32; id. SR. 817, para. 33; id. SR. 819, para. 10. Thus the age of eighteen was seen as the minimum cutoff point.

⁷²The delay by some States in ratifying the Covenant can be attributed to such factors as its burdensome reporting procedures, which no doubt some States are not too anxious to undertake.

of State practice and opinio juris, without the need to examine other items⁷³). A fortiori we have a customary rule of international law when, as here, the rule has been codified for twenty-two years (counting as of the adoption of the Covenant alone); was recognized as a customary rule beforehand; was reaffirmed in other normative instruments thereafter, including the American Convention (see supra note 54) and such as the Resolution by the General Assembly of 1980 (for which the United States voted) endorsing the view that Article 6 of the Covenant constitutes "a minimum standard" for all Member States (not just ratifying States)⁷⁴;

⁷³See generally Baxter, Multilateral Treaties as Evidence of Customary International Law, XLI Brit. Y.B. Int'l L. 275 (1965-1966).

⁷⁴G.A. Res. 35/172, 35 U.N. GAOR, Supp. No. 48, U.N. Doc. A/35/48, at 195 (1980). Like a treaty, a resolution of the General Assembly can be viewed as a constitutive element of State practice or as evidence of State practice, or both, as well as a vehicle for expressing opinio juris. Important,

and is amply reflected in intrastate practice.

Even as an ordinary rule of customary international law (even if not jus cogens or a rule deriving from "principles of law recognized by civilized nations") the norm embodied in Article 6(5) of the Covenant is binding on the United States, being that this country does not qualify as an ab initio consistent objector, as the evidence presented in this and in companion briefs conclusively shows (the long-standing full adherence of the United States to the Geneva Convention of 1949 alone should be determinative here).⁷⁵ An important consideration in this connection is the fact

broadly supported resolutions can, moreover, be viewed as a source of international law, additional to treaty and custom. See the Namibia opinion supra note 39, at 50-57; Western Sahara Case, 1975 I.C.J. 12; separate opinion of Judge Ammoun supra note 18.

⁷⁵See AMNESTY INTERNATIONAL brief on the travaux préparatoires of the International Covenant and the American Convention on Human Rights.

that any expressed reservations on the part of United States officials with regard to provisions such as Article 6(5) of the Covenant have been voiced in terms of the inconvenience and delicate internal jurisdictional considerations that such stipulations would entail by reason of the inconsistency between them and current laws in the United States. This is not a substantive reservation; not an objection in principle.⁷⁶ Moreover, United States diplomatic representatives have seen fit not to dissent against, and even support, United Nations resolutions re-affirming the norm

⁷⁶See supra text accompanying note 53 regarding the import of pleading domestic law as against international standards. The purpose of international human rights law is to uplift national standards and not to emulate the least common denominator.

(such as the resolutions on Article 6(5) of the Covenant and "The Beijing Rules").⁷⁷

Thus the prohibition contained in Article 6(5) of the Covenant and other international instruments is part of the federal common law and ipso jure supercedes contravening state legislation. It should, at least be held to conclusively inform this Court's interpretation of relevant provisions of this nation's Constitution (particularly as, even in its absence, such interpretation cries for the same result). Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 1, 43 (1804); Weinberger v. Rossi, 456 U.S. 25, 33 (1982).⁷⁸

⁷⁷See supra note 74 and accompanying text; AMNESTY INTERNATIONAL brief, footnote (as to President Carter's Message to the Senate of Feb. 27, 1978) and text preceding the "Conclusion".

⁷⁸See also, Schachter, supra note 53, at 315.

CONCLUSION

For the reasons above stated, Amicus DCI prays that this Court spare the life of the petitioners; and strike down laws, such as the statutes under review, which allow such unconscionable cruelty to be perpetrated on persons of young age. Surely, in this day and age, the state-killing of petitioners, or others like them, is not "the best that mankind has to give" our children. Opening the door to such practices would be the ultimate betrayal of a sacred trust of civilization. It would be a giant retrograde step of global proportions in the progressive development of the rule of law.

Respectfully submitted,

ANNA MAMALAKIS PAPPAS

Counsel of Record

Attorney for

Amicus Curiae

Nos. 87-5666 and 87-6026

Supreme Court, U.S.

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87-5785
IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,
v. *Petitioner*

WALTER ZANT,
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

HEATH A. WILKINS,
v. *Petitioner*

STATE OF MISSOURI,
Respondent

On Writ of Certiorari to the Missouri Supreme Court

**BRIEF OF AMICUS CURIAE
THE AMERICAN BAR ASSOCIATION**

ROBERT D. RAVEN *
President
American Bar Association

ANDREW J. SHOOKHOFF
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

* Counsel of Record

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-5666 and 87-6026

JOSE MARTINEZ HIGH,
v. *Petitioner*

WALTER ZANT,
Respondent

**On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit**

HEATH A. WILKINS,
v. *Petitioner*

STATE OF MISSOURI,
Respondent

On Writ of Certiorari to the Missouri Supreme Court

**BRIEF OF AMICUS CURIAE
THE AMERICAN BAR ASSOCIATION**

INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its over 343,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes prosecutors, public defenders, private attorneys, trial and appellate judges

at the state and federal levels, legislators, law enforcement and corrections professionals, law school deans, law professors, law students, and a number of non-lawyer associates in allied fields.

Since its inception over one hundred years ago, the ABA has taken an active interest in improving the administration of justice. It has also taken a special interest in the improvement of the juvenile justice system. Toward these ends the ABA has promulgated two comprehensive sets of standards, the *ABA Standards for Criminal Justice* and, in conjunction with the Institute of Judicial Administration (IJA), the *IJA/ABA Juvenile Justice Standards*.

The IJA/ABA Juvenile Justice Standards Drafting Project, which was completed in 1980 with the adoption of the *Juvenile Justice Standards*, involved one of the most thorough studies of our society's response to the problems of juvenile crime ever undertaken. The Standards not only provide a thorough analysis of the historical, legal, and criminological developments in society's effort to respond to juvenile crime, but, because of the diversity of disciplines and perspectives represented by the contributors, the Standards in many ways reflect our society's knowledge, attitudes and values about children who commit crimes. The Project took no position on the death penalty.

In 1983, however, the ABA House of Delegates adopted a resolution opposing, on policy grounds, capital punishment for crimes committed by minors under the age of eighteen years [hereinafter referred to as the "juvenile death penalty"]: "BE IT RESOLVED, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." ABA, *Summary of Actions of the House of Delegates, 1983 Annual Meeting, Reports of Sections 17*. The House of Dele-

gates took no position on the constitutionality of the juvenile death penalty. The adoption of the House resolution followed almost two years of research and consideration of the issue by the ABA Section on Criminal Justice, as summarized in its Report to the House of Delegates in support of the resolution. ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates, Report No. 117A* (August 1983) (hereinafter cited "ABA Juvenile Death Penalty Report").

The imposition of the death penalty for crimes committed by minors presents its own special concerns of justice. This claim is underscored by the fact that the ABA has rejected resolutions to limit the use of the death penalty for adults. In 1977, the ABA Section on Individual Rights and Responsibilities proposed a resolution urging the state legislatures to abolish the death penalty in all cases. That resolution failed by a 168-69 vote. ABA *Summary of Actions of the House of Delegates, 1977 Mid-year Meeting, Reports of Sections 18*. In 1979, the ABA Criminal Justice Section proposed a resolution to approve sentencing guidelines limiting the circumstances under which capital punishment could be imposed. That resolution failed in the House of Delegates by voice vote. ABA *Summary of Actions of the House of Delegates, 1979 Annual Meeting, Reports of Sections 23*. This year the House of Delegates passed a resolution supporting the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing, while again emphasizing that "this resolution does not create a position for the ABA on whether or not capital punishment is an appropriate criminal sanction." ABA *Summary of Actions of the House of Delegates, 1988 Annual Meeting, Reports of Sections —*.

The ABA participated as amicus curiae in *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988), and set forth in its

brief the considerations which led to the ABA position that the juvenile death penalty cannot be reconciled with contemporary societal values. Although a number of these considerations were acknowledged in the plurality and concurring opinions in *Thompson*, the Court did not reach the issue of the constitutionality of imposing capital punishment for crimes committed by minors under the age of eighteen. The ABA participates as amicus curiae in these cases to underscore the Association's position that for reasons central to our perceptions of ourselves as a civilized society the death penalty should not be imposed upon any person for any offense committed while under the age of eighteen.

SUMMARY OF ARGUMENT

Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults. See IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3 (1980). In light of these characteristics, minors are neither entitled to all the rights and privileges of adulthood, nor are they given the full obligations of adulthood until they reach their eighteenth birthdays. See, e.g., U.S. Const. amend. XXVI, § 1.

Because our criminal justice system is based on concepts of individual responsibility, the differences between minors and adults in their capacities to assume such responsibility, recognized in other legal contexts, should be reflected in our response to crimes committed by minors. The development of the juvenile justice system is the clearest manifestation of society's commitment to this principle of separate treatment of adult and juvenile offenders. Notwithstanding the distinctions in law and fact between minors and adults, the juvenile justice system cannot deal with all juvenile crime. Some minors who commit serious crimes must be subject to trial and sen-

tencing in the criminal justice system in order adequately to protect society and vindicate the criminal laws. However, the fact that a minor is appropriately tried in the criminal justice system does not mean that the ultimate criminal sanction, execution, is appropriate.

The special nature of childhood in our society led to the ABA position against the juvenile death penalty and is directly relevant to the issue before the Court. The death penalty is reserved for people whose crimes are so severe, whose character is so depraved, and whose moral culpability is so great as to warrant the ultimate sanction. See generally *Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976). For the same reason we in other legal contexts conclusively presume that minors under the age of eighteen are not mature and responsible to the same extent as adults, they should not be held to the degree of moral accountability necessary to justify the ultimate sanction of execution.

ARGUMENT

BECAUSE THE LAW CONCLUSIVELY AND PRUDENTLY PRESUMES THAT MINORS UNDER THE AGE OF EIGHTEEN ARE NOT CAPABLE OF EXERCISING THE FULL RESPONSIBILITIES OF ADULTHOOD, THEY SHOULD NOT BE HELD TO THE LEVEL OF MORAL ACCOUNTABILITY NECESSARY TO JUSTIFY THE IMPOSITION OF THE PUNISHMENT OF DEATH.

Although the ABA has taken no position on the constitutionality of the juvenile death penalty, the reasons for opposing that sanction as a matter of policy are relevant to this Court's consideration of the constitutional issue. The ABA policy both derives from and reflects the special significance that our society attaches to the status of minority—a special significance that shapes and defines the issue in this case.

As this Court has observed in a number of different contexts, "children have a very special place in life which the law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). In cases which present fundamental questions involving minors—in this case questions of life and death—we cannot ignore the significance of the status of minority. "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." *Id.*

Minors are "most susceptible to influence and psychological damage" and "lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental." *Bellotti v. Baird*, 443 U.S. 602, 635 (1979). They are in the early stages of their emotional growth; their intellectual development is incomplete; they have only limited practical experience; and their value systems are not yet clearly identified and firmly adopted. *Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984) (citing *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 350 N.E.2d 906 (1976)). Unlike adults, minors are always in some form of custody and subject to the control of their parents or the state as *parens patriae* upon whom the responsibility of making important decisions for the minor traditionally rests. *Schall v. Martin*, 467 U.S. at 265; *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

It is only upon the premise that a minor "is not possessed of that full capacity for individual choice . . . that a state may deprive children of . . . rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). The law thus "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring.)

This recognition is apparent in the development of a separate juvenile justice system for dealing with juvenile crime. Separate treatment of juveniles for their criminal conduct is a relatively recent development. Under common law, children over the age of seven (the age below which a child was considered incapable of possessing criminal intent) were subjected to criminal prosecution and punishment like adult offenders. *In re Gault*, 387 U.S. 1, 16 (1967). However, reaction to the harshness of a system that made no distinction between minor and adult when criminal conduct was involved was widespread and led to the development of separate juvenile justice systems in every jurisdiction in the country. *Id.* at 14-15. The underlying premise of this separate system was that minors are less mature, less able to exercise control and judgment, more easily influenced by others and by their environment and thus less culpable than adults for their actions.

Despite the more recent recognition that the achievements of separating systems of juvenile and criminal justice have fallen short of the goals, *see id.* 387 U.S. at 17-18, our society has not abandoned the underlying premise that minors who commit crimes should be treated differently from adults. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 258 (1973); *Schall v. Martin*, 467 U.S. 253 (1984). Thus, the IJA/ABA *Juvenile Justice Standards*, which provide a candid critique of the juvenile justice system and call for considerable system reform, nevertheless reaffirm the vitality of this underlying principle.¹ *See IJA/ABA Standards for Juvenile Justice: Summary and Analysis* 40-41 (1982).

¹ There is a tendency to distinguish the juvenile justice system from the criminal justice system by contrasting the "rehabilitative" goals of the former with the "punitive" goals of the latter. However, as this Court has noted, the juvenile justice system has punitive characteristics, *see In re Gault*, 387 U.S. at 27-30; and the criminal justice system is not unconcerned with treatment and

While not addressing the death penalty issue directly, the IJA/ABA *Juvenile Justice Standards* deal specifically with the issue of subjecting some minors who commit crimes to the jurisdiction of the criminal court. Notwithstanding our recognition that minors should not be held to the same standards of criminal responsibility as adults, the protection offered by the juvenile justice system is not appropriate for some minors. IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3. Some acts are so offensive to the community that only criminal court jurisdiction can ensure that control is maintained over the juvenile offender for a period proportionate to his offense and prior record. *Id.* However, the existence of a mechanism for transfer of jurisdiction and the acceptance of the necessity of being able to exercise criminal court jurisdiction over children for commission of serious crimes does not establish the propriety of treating a minor as an adult for the specific and extreme purpose of imposing the death penalty. The transfer decision—whether discretionary with the judge or prosecutor or mandated by the legislature—does not involve a determination that a minor is as mature as an adult and often involves no consideration of individual maturity, especially when the offense is most serious. See Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. Rev. 757, 771-72 (1986); Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1476-79 (1983). Rather the transfer of jurisdiction is often a pragmatic

rehabilitation. See *Breed v. Jones*, 421 U.S. 519, 530 n.12 (1975). In the ABA's view, whether the guiding principle articulated is treatment, rehabilitation, protection of society through deterrence, or retribution, it is the fact of childhood and the fundamental differences between minors and adults that are the critical factors which ultimately provide the rationale for separate systems. See IJA/ABA *Juvenile Justice Standards Relating to Dispositions*, Standard 1.1 and commentary thereto (1980).

decision that the limited jurisdiction of the juvenile justice system cannot provide adequate protection for the community. See *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2707 (1988) (O'Connor, J., concurring).

The factors that warrant transfer and the concomitant decision to subject the minor to the lengthy sentences available in criminal court thus do not resolve the issue of the propriety of the death penalty for the minor who is transferred. It is not at all incongruous to find states in which the juvenile death penalty had been statutorily permissible lowering the minimum age for transfer to adult court as part of "getting tough" on juvenile crime while at the same time eliminating the juvenile death penalty. See, e.g., Tenn. Code Ann. § 37-1-134(1) (1984) (1982 amendments); Or. Rev. Stat. §§ 161.620 (1985), 419.533 (1983) (1985 amendments).

The issue before this Court is whether a minor under the age of eighteen can, consistent with the Eighth Amendment, be held to that level of responsibility and moral culpability for which society reserves the penalty of death. The words of the Eighth Amendment proscribing imposition of criminal penalties which are cruel and unusual, "are not precise and . . . their scope is not static." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). The meaning of the Amendment is drawn "from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Thus, punishments which may have been accepted by society when this amendment was adopted can come to be viewed in our time as excessive and unconstitutional. *Gregg v. Georgia*, 428 U.S. at 171 (opinion of Stewart, Powell and Stevens, JJ.).

The death penalty is different in kind from any other criminal punishment; it is "unique in its severity and irrevocability." *Id.* at 187. In light of this, this Court has held that the discretion to impose the death penalty

must be limited and directed to ensure that it is not inflicted in an arbitrary and capricious manner. *Zant v. Stephens*, 462 U.S. at 874. Not only must the sentencing authority be provided guidelines, but it must be able to consider any and all mitigating factors, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), including the character and record of the individual and the circumstances of the particular offense, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.) and must in fact consider such mitigating factors. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

In certain situations, however, the Court has refused to allow the sentencing authority the discretion to determine whether a defendant should live or die based on a balancing of aggravating and mitigating circumstances presented by the individual case. If the crime is the rape of an adult woman and it does not result in the death of the victim, the death penalty is prohibited. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). If the crime results in the death of the victim, but the person charged is guilty of felony murder *simpliciter*, the death penalty is prohibited. *Enmund v. Florida*, 458 U.S. 782, 788 (1982). For felony murders, the standard appears to be that the death penalty may be imposed if the defendant is a major participant in the felony committed who acted intentionally or with reckless indifference to human life. *Tison v. Arizona*, 107 S.Ct. 1676, 1688 (1987). Thus, there are situations in which ensuring an individualized consideration of the circumstances of the offense simply does not satisfy the Eighth Amendment; this Court has therefore prohibited execution in such cases.

This Court has already recognized that the youth of a defendant is a mitigating factor which is entitled to great weight, *Eddings v. Oklahoma*, 455 U.S. at 116. In *Thompson v. Oklahoma*, four members of this Court

held that the youth of the defendant alone, at least where the child is under the age of sixteen, is an absolute bar to execution, 108 S.Ct. at 2700, and one Justice, although concurring on narrower grounds, indicated her belief that the plurality was probably correct. 108 S.Ct. at 2706 (O'Connor, J., concurring). The issue in this case is whether, when the crime is committed by a minor under the age of eighteen, the fact of minority is of such overriding importance that a bright line must be drawn prohibiting execution.

In determining whether a particular punishment once tolerated can no longer be reconciled with our advancing standards of decency, the Court has looked to various indicia of contemporary values and attitudes. *Coker v. Georgia*, 433 U.S. at 592 n.10. As the plurality noted in *Thompson v. Oklahoma*, the position of the ABA itself is an indicator of such values and attitudes. See *Thompson v. Oklahoma*, 108 S.Ct. at 2696. The House of Delegates which sets ABA policy is composed of representatives of every state and reflects the broad spectrum of political and social views of the legal community. See Appendix A (ABA Constitution and Bylaws concerning composition of House of Delegates). The fact that the ABA, which has not opposed the death penalty for adults, is opposed to the death penalty for juveniles, is one reflection of the national consensus on this issue.

Moreover, the ABA Juvenile Death Penalty Report considered other indicia of contemporary values and attitudes such as international and legislative norms in concluding that a civilized society should no longer allow execution for crimes committed by minors. The ABA considered evidence, documented by the plurality opinion in *Thompson v. Oklahoma*, 108 S.Ct. at 2696, that the juvenile death penalty is overwhelmingly rejected in the international community. The ABA also found evidence of the unacceptability of the juvenile death penalty in the increasing number of states that upon specific con-

sideration of the application of the death penalty to persons below the age of eighteen have rejected it. See *Thompson v. Oklahoma*, 108 S.Ct. at 2696 n.30. This evidence was particularly compelling in light of the reenactment of the death penalty in thirty-five jurisdictions since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

Finally, the ABA Juvenile Death Penalty Report considered the role of a death penalty for juveniles in furthering deterrence and retribution, two values recognized by this Court as legitimate bases for imposing criminal penalties including capital punishment. *Gregg v. Georgia*, 428 U.S. at 183 (1976) (opinion of Stewart, Powell and Stevens, JJ). The report concluded that these justifications "... lose much of their persuasiveness when applied to an adolescent's case." ABA Juvenile Death Penalty Report 8-9. Whatever deterrent effect might exist for potential adult offenders, *Gregg v. Georgia*, 428 U.S. at 184-85, in light of the characteristics associated with childhood—impulsiveness, lack of self control, poor judgment, feelings of invincibility—the deterrent value of the juvenile death penalty is likely of little consequence. In any event, it would be difficult to support a claim that the death penalty as a deterrent for juvenile crime, as opposed to life imprisonment, "is an indispensable part of the State's criminal justice system." *Coker v. Georgia*, 437 U.S. at 592 n.4. Whatever deterrent value might exist is insignificant when balanced against the societal values compromised by the juvenile death penalty.

Retribution, defined by this Court as "the expression of society's moral outrage at particularly offensive conduct" *Gregg v. Georgia*, 428 U.S. at 183, is also an unsatisfactory justification for the juvenile death penalty. The moral force of—and thus the legal justification for—taking human life in retribution is dependent on the degree of culpability of the offender, and not just on the injury to the victim. See *Enmund v. Florida*, 458 U.S. at

800. Because of our societal attitudes and well-founded legal presumptions regarding the status of minority, a minor simply cannot be held to that degree of culpability and accountability.

Lines drawn on the basis of age inevitably appear arbitrary for those near the line of demarcation. However, as a society we must in important matters of legal rights and responsibilities make distinctions based on age alone that are absolute and allow no exceptions for the particularly responsible or irresponsible person of that age. In areas in which the rights exercised or the responsibilities imposed are of the highest order in our society—the right to vote and the responsibility to serve on a jury—every jurisdiction conclusively presumes that children under the age of eighteen, no matter how mature, are incapable of exercising adult responsibility. See *Thompson v. Oklahoma*, 108 S.Ct. at 2701, Appendices A and B. Even the dissent recognizes that at some point age alone must be held to be an absolute bar to execution. *Thompson v. Oklahoma*, 108 S.Ct. at 2714. The ABA submits that the appropriate point to draw the line for purposes of the death penalty is at the age of eighteen.

CONCLUSION

The death penalty should not be imposed upon any person for any offense committed while under the age of eighteen.

Respectfully submitted,

ROBERT D. RAVEN *

President

American Bar Association

ANDREW J. SHOOKHOFF

750 North Lake Shore Drive

Chicago, Illinois 60611

(312) 988-5000

* Counsel of Record

APPENDIX A

American Bar Association, Constitution and Bylaws; Rules of Procedure House of Delegates; Article 6, Section 6.1 and 6.2 (1987-88).

Article 6. The House of Delegates

§ 6.1 Powers and Functions. The House of Delegates shall control, formulate policy for, and administer the Association. It has all the powers necessary or incidental to performing those functions. It shall supervise and direct the Board of Governors, officers, sections, committees, and employees and agents of the Association. It may adopt rules consistent with the Constitution and Bylaws. It is the judge of the election and qualifications of its members.

§ 6.2 Composition. (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:

The State Delegates, one for each state, who also serve as chairmen of the delegate groups from the respective states.

The state bar association delegates, at least one for each state.

The delegates from eligible local bar associations, one for each eligible association.

The Assembly Delegates elected by the Assembly, 15 in number.

The delegates representing the respective sections of the Association, at least one for each section and the Senior Lawyers Division except four for the Young Lawyers Division (including the Young Lawyers Division representative on the Nominating Committee), and two for the Law Student Division.

The delegates representing the following conferences of the Judicial Administration Division: One each for

the Appellate Judges' Conference, the National Conference of State Trial Judges, the National Conference of Special Court Judges, the National Conference of Federal Trial Judges, and the Conference of Administrative Law Judges.

The members of the Board of Governors, except the administrative officer.

The former elected members of the Board of Governors, for two Association years immediately following the end of their respective terms.

The former presidents of the Association and former chairmen of the House of Delegates; provided that all former presidents or chairmen elected to those positions after August 15, 1975, shall be full voting members of the House for ten years after the conclusion of their service as president or chairman and with voice but no vote thereafter.

The former secretaries and former treasurers of the Association who have had three or more years of service as such, as except that a former officer first elected to an office that qualifies him under this provision after August 15, 1975, may serve for only the five Association years immediately following the end of this term.

The Attorney General of the United States or, at his option, the Deputy Attorney General or the Solicitor General.

The Director of the Administrative Office of the United States Courts.

The delegates from affiliated organizations, one for each organization.

(b) Beginning in 1995 and at least once every ten years thereafter, a review of the representation in the House in terms of Association membership shall be conducted to ensure appropriate representation of the above constituencies.

87 - 5765
IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER ZANT, WARDEN,

Respondent.

HEATH A. WILKINS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT AND TO THE SUPREME
COURT OF THE STATE OF MISSOURI

**BRIEF OF THE AMERICAN SOCIETY FOR
ADOLESCENT PSYCHIATRY AND THE AMERICAN
ORTHOPSYCHIATRIC ASSOCIATION AS AMICI
CURIAE IN SUPPORT OF PETITIONERS**

JOSEPH T. McLAUGHLIN

Counsel of Record

JEREMY G. EPSTEIN

HENRY WEISBURG

KENNETH A. FREELING

STEVEN M. PINCUS

SHEARMAN & STERLING

153 East 53rd Street

New York, New York 10022

(212) 848-4000

Attorneys for Amici Curiae

September 2, 1988

Question Presented for Review

1. Is the execution of an individual who was under the age of 18 at the time he or she committed a capital offense cruel and unusual punishment in violation of the Eighth Amendment?

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INTEREST OF AMICI CURIAE

The American Society for Adolescent Psychiatry and the American Orthopsychiatric Association file this brief as *amici curiae* in support of petitioners by written consent of all parties, pursuant to Rule 36.2 of the Rules of this Court. We are informed that parties' letters of consent are on file with the Clerk.

The American Society for Adolescent Psychiatry ("ASAP") (S. Dion Smith, M.D., President) was founded in 1967 and today has approximately 1,400 members. ASAP provides a national forum for adolescent psychiatry and promotes the exchange of psychiatric knowledge about adolescents. Since its founding, ASAP has supported research on the normal development, as well as the psychopathology and treatment, of adolescents, helped to broaden knowledge and understanding of the various factors that may influence adolescent development and substantially improved the psychiatric community's ability to recognize and diagnose psychiatric problems common in adolescents. Half of ASAP's members are child psychiatrists, while the remaining members are general psychiatrists and psychoanalysts who maintain an active professional interest in adolescents. Its members work with adolescents in hospitals, schools and psychiatric clinics around the country as well as within the nation's juvenile court system.

The American Orthopsychiatric Association ("Ortho") (Bernice Weissbourd, M.A., President) was established in 1924 and has traditionally been concerned with the problems, causes, treatment and prevention of psychiatric disturbances. It is an organization comprised of more than 10,500 members representing a variety of mental health-related professions — psychiatry, psychology, psychiatric nursing, social work, education and the law — including experts in adolescent development. With its broad-based membership, Ortho has consistently helped to shape public policy in the mental health and human development field from varying professional perspectives.

Amici sponsor a wide array of educational programs for their members and other mental health professionals. In addition, each *amicus* publishes a scientific journal.

Amici are organizations with extensive background and experience in adolescent development. This brief is intended to provide the Court with relevant data that will enable it to judge

the critical issue herein effectively, fairly and with greater knowledge of adolescents' developmental capabilities. Adolescents are developmentally different from adults. Accordingly, *amici* strongly urge the Court to spare adolescents the imposition of capital punishment.

SUMMARY OF ARGUMENT

The law has historically recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently. This view is confirmed by a vast body of clinical research and literature. Psychiatrists and psychologists have demonstrated that adolescents have not yet developed many of the psychological, cognitive and emotional characteristics of mature adults. Adolescents tend to be less mature, more impulsive and less capable of controlling their conduct and thinking in terms of long-range consequences. Adolescence is a stage of human development in which one's character and moral judgment are incomplete and still undergoing formation. An adolescent's character structure is more flexible than an adult's and remains open to major modifications. (Point I)

Adolescents who commit capital offenses typically suffer from a variety of serious disturbances which inhibit their natural development. They come from chaotic families, have been exposed to extreme violence, suffer severe cognitive limitations, and frequently have long-standing psychiatric and neurological problems. These factors tend to exacerbate the existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior. The findings of a recently completed study of persons on death row who committed capital offenses in their adolescence are consistent with this general understanding about youthful offenders. Heath Allen Wilkins exhibits all of the characteristics typical of this distinct subgroup. Jose Martinez High has never been afforded a comprehensive psychiatric and neurological examination. It is reasonable to expect that a thorough evaluation of Jose would reveal the same type of abnormalities found in all other adolescents on death row. (Point II)

The Eighth Amendment forbids the infliction of cruel and unusual punishment. Punishment is inherently cruel and unusual if it is disproportionate to the crime or to the offender's moral culpability for that crime, or if it fails to make any measurable

contribution to acceptable goals of punishment. As applied to adolescents, capital punishment is both disproportionate and makes no measurable contribution to acceptable goals of punishment. It is disproportionate as applied to youthful offenders because youths, given their incomplete psychological and emotional development, are less culpable than adults for their offensive acts. The death penalty is also contrary to the only legitimate aims of punishing the young: rehabilitation and treatment. Finally, in light of contemporary human understanding about adolescents generally and adolescents who commit capital offenses in particular, the death penalty as applied to adolescents is contrary to contemporary standards of decency. Execution of adolescents is therefore inherently cruel and unusual in violation of the Eighth Amendment. (Point III)

ARGUMENT

I

PSYCHIATRISTS, PSYCHOLOGISTS AND OTHER ADOLESCENT DEVELOPMENT EXPERTS RECOGNIZE THAT ADOLESCENCE IS A TRANSITIONAL PERIOD BETWEEN CHILDHOOD AND ADULthood IN WHICH YOUNG PEOPLE ARE STILL DEVELOPING THE COGNITIVE ABILITY, JUDGMENT AND FULLY FORMED IDENTITY OR CHARACTER OF ADULTS

The law has always recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently.¹ As this Court said:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

¹ Examples of this different treatment include limitations on youths' rights to vote, contract, serve as jurors, purchase liquor, marry, drive motor vehicles, enlist in the armed services, or accept employment. See generally F. Zimring, *The Changing Legal World of Adolescence* (1982).

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). This view is confirmed by a vast body of clinical research and literature.²

Psychiatrists, psychologists and other child development experts have demonstrated that adolescents are at a stage of development in which they lack the cognitive ability,³ judgment and fully-formed identity or character of adults. "[A]dolescence is the transitional period between childhood and adulthood. It begins with the biological events of puberty and continues through a complex series of psychological and sociocultural events and influences to the establishment of an independently functioning person."⁴ Age 18 is a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.⁵

² See, e.g., Brunstetter & Silver, *Normal Adolescent Development*, in 2 *Comprehensive Textbook of Psychiatry* 1608 (H. Kaplan & B. Sadock 4th ed. 1985); Hamburg & Wortman, *Adolescent Development and Psychopathology*, in 2 *Psychiatry* ch. 4 (J. Cavenar ed. 1985); *Handbook of Clinical Child Psychology* (C. Walker & M. Roberts eds. 1983); M. Lewis, *Clinical Aspects of Child Development* (2d ed. 1982); S. Ambron, *Child Development* (3d ed. 1981); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979); M. Rutter, *Changing Youth in a Changing Society* (1979); Graham & Rutter, *Adolescent disorders*, in *Child Psychiatry: Modern Approaches* 407 (M. Rutter & L. Hersov eds. 1977).

³ Cognition refers to the processes involved in perception, memory, reasoning, reflection, and insight. P. Mussen, J. Conger & J. Kagan, *supra* note 2, at 233-34.

⁴ Brunstetter & Silver, *supra* note 2, at 1608.

⁵ See, e.g., Hammar, *Adolescence*, in 1 *Practice of Pediatrics* ch. 4, at 1 (V. Kelley ed. 1987) (adolescent growth and development occurs from age 10 through age 20); Brunstetter & Silver, *supra* note 2, at 1608 ("most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school"); Hamburg & Wortman, *supra* note 2, at 8 (an adolescent does not develop autonomy, a sense of self and a sense of identity until his or her early 20s); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues: A Review of Cross-sectional, Longitudinal, and Sequential Studies in the Defining Issues Test*, 49 *Child Development* 263, 276-77 (1978) (development of moral judgment continues throughout a person's early 20s); Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, *Daedalus* 1051, 1065, 1072 (Fall 1971) (development of formal reasoning and principled moral judgment continues into a person's early 20s).

(footnote continued)

An adolescent's intellectual growth is incomplete and his or her reasoning skills and logic are immature. From a cognitive perspective, adolescents are in the process of moving from "concrete operational thought" to "formal operational thought."⁶ An adolescent begins to consider the possible as well as the actual.⁷ These new cognitive skills develop continuously and "most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school."⁸ Formal, abstract reasoning is a complex ability that is influenced by training and experience.⁹ Therefore, although adolescents begin to acquire a broader awareness, they lack the judgment necessary to choose carefully among various possibilities and to appreciate the future consequences of their actions.

Behaviorally, the effects of an adolescent's developing cognitive ability include increased impulsiveness, experimentation and risk-taking. An adolescent's newly forming capacity to reason abstractly, coupled with his or her "fascination with the possible," results in a desire to explore various behaviors.¹⁰ However, because of an adolescent's limited experience and lack of ability to assess future consequences, he or she is unable to conceptualize realistically the potential negative outcomes of certain actions. This difficulty contributes to a young person's feelings of invulnerability to personal risk.¹¹ Hence adolescents often engage in alcohol and drug use/abuse, sexual experimentation, reckless use of motor vehicles and other potentially destructive behaviors.¹²

Traditionally, our society, through our legal system, has chosen age 18 as the dividing line between adolescence and adulthood. See, e.g., *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 2701-02 (1988) (appendices listing state statutes that set age 18 as the minimum voting age and the minimum age for jury service). Psychiatrists and psychologists consider this a reasonable choice. See Hamburg & Wortman, *supra* note 2, at 3.

⁶ Cognitive capacity develops in a sequence of stages. Jean Piaget is credited with documenting this growth and providing the terminology for these stages. See B. Inhelder & J. Piaget, *The Growth of Logical Thinking from Childhood to Adolescence* (1958); H. Ginsburg & S. Oppen, *Piaget's theory of intellectual development* (1969).

⁷ See, e.g., S. Ambron, *supra* note 2, at 432-33.

⁸ Brunstetter & Silver, *supra* note 2, at 1608.

⁹ *Id.*

¹⁰ Irwin & Millstein, *Biopsychosocial Correlates of Risk-Taking Behaviors*, *J. Adolescent Health Care*, Vol. 7, No. 6S, 82S, 87S (November 1986 Supplement).

¹¹ *Id.* at 87S.

¹² *Id.* at 82S; see also Goleman, *Teen-Age Risk-Taking: Rise in Deaths Prompts* (footnote continued)

Furthermore, researchers studying adolescent suicide have documented that adolescents tend not to appreciate fully the possibility, and finality, of death.¹³ If they consider death at all, it is viewed as something that happens to elderly people, not teenagers. Many adolescents who attempt suicide may not really believe that death will occur. In fact, they may view a suicide attempt as nothing more than a form of running away, without any consideration of their own mortality.¹⁴

Adolescent cognitive development is also characterized by a high degree of egocentrism. An adolescent "assumes that other people are as obsessed with his behavior and appearance as he is himself. It is this belief that others are preoccupied with his appearance and behavior that constitutes the egocentrism of the adolescent."¹⁵

Moreover, adolescents come to regard themselves, and their own feelings, as particularly special and unique. This belief further contributes to an adolescent's lack of understanding regarding death. An adolescent's sense of specialness becomes a conviction of his or her immortality.¹⁶ Adolescent egocentrism thus results in a general impairment of adolescent judgment.

Adolescence is also a period during which youths struggle to develop a certain measure of independence and personal identity or character.¹⁷ An adolescent engages in this developmental task

New Research Effort, N.Y. Times, Nov. 24, 1987, at C1, col. 1 ("[T]eenagers are notoriously reckless. Research suggests a combination of hormonal factors, an inability to perceive risks accurately and the need to impress peers help explain this.")

¹³ Sheras, *Suicide in Adolescents*, in *Handbook of Clinical Child Psychology* 759, 769-70 (C. Walker & M. Roberts eds. 1983).

Adolescent suicide and suicide pacts among teenagers have become a growing national concern. See, e.g., Barron, *Suicide Rates of Teenagers: Are Their Lives Harder to Live?*, N.Y. Times, April 15, 1987, at C1, col. 5. Suicide is reported to be the third leading cause of death for teenagers. Sheras, *supra*, at 769.

¹⁴ Sheras, *supra* note 13, at 769; Miller, *Adolescent Suicide: Etiology and Treatment*, in *Adolescent Psychiatry* 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981).

¹⁵ Elkind, *Egocentrism in Adolescence*, 38 *Child Development* 1025, 1029-30 (1967) (emphasis in original deleted).

¹⁶ *Id.* at 1030-31.

¹⁷ See generally E. Erikson, *Identity: Youth and Crisis* (1968); E. Erikson, *Childhood and Society* (1963); P. Mussen, J. Conger & J. Kagan, *supra* note 2.

in a number of ways,¹⁸ such as trying out various roles, separating from his or her parents, and seeking affirmation from a peer group. Throughout this process, adolescents remain emotionally dependent on other people.¹⁹ They are vulnerable to influences from both parents and peers, and are less capable of independent, self-directed action than adults. While striving to be independent, adolescents still need the guidance and support of responsible, caring adults. The character structure of adolescents, though developing, remains in flux and does not represent the final level of maturity found in adults. Adolescents are by nature capable of significant and spontaneous change.²⁰

Normal adolescence is no longer considered necessarily a time of extreme emotional turmoil.²¹ Adolescence is, however, generally characterized by emotionality rather than rationality. Adolescents tend to show a special intensity of feeling and tend to seek out emotional experiences. Moreover, it has been demonstrated consistently that "adolescents experience a greater fluctuation of mood than adults."²²

¹⁸ It is understandable that many adolescents must struggle to develop a personal identity. In addition to the changes adolescents experience in how they think, they also undergo vast physiological and hormonal changes. Adolescents are faced with rapid increases in height, changing bodily dimensions, and physical and psychological changes related to sexual maturation. All of these changes threaten an adolescent's sense of self. See M. Lewis, *supra* note 2, at 263-66.

¹⁹ "[T]he transition from childhood into adolescence is marked more by a trading of dependency on parents for dependency on peers rather than straightforward and unidimensional growth in autonomy." Steinberg & Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *Child Development* 841, 848 (1986).

²⁰ For example, young people can later overcome features of an antisocial personality that appear during adolescence. For this reason the diagnosis of antisocial personality cannot be applied until an individual has reached 18 years of age. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 342 (3d ed. rev. 1987).

²¹ See, e.g., M. Rutter, *supra* note 2, at 235-38; Rutter, Graham, Chadwick & Yule, *Adolescent Turmoil: Fact or Fiction?*, 17 *J. Child Psychology & Psychiatry* 35 (1976); D. Offer & J. Offer, *From teenage to young manhood: a psychological study* (1975).

Daniel Offer's work has suggested that adolescents who experience the greatest inner turmoil are of lower socioeconomic status, and come from families with overt marital conflicts and a history of mental illness. See D. Offer, *The Psychological World of the Teenager* (1969).

²² Hamburg & Wortman, *supra* note 2, at 11.

Finally, adolescents lack the capacity for mature, principled moral judgment which is characteristic of normal adult thought. Moral judgment emerges through the maturation process as a result of cognitive and emotional growth and an adolescent's interaction with his or her environment. An adolescent lacks a fully formed value system against which to evaluate his or her behavior and decisions. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth."²³

Adolescents must undergo an array of significant changes prior to adulthood. Before these many developmental tasks are achieved, adolescents are vulnerable in a variety of ways. They have difficulty appreciating the future consequences of their acts, generally lack mature judgment, are easily influenced by family members and peers and often engage in experimentation and risk-taking. Adolescents tend to be guided by emotions rather than reason. Furthermore, adolescents lack a fully formed identity or character, and generally do not have the capacity for principled moral judgment.

Adolescence is a critical developmental stage through which young persons must pass prior to entering adulthood. The clinical literature confirms what we all generally know and what the law has always recognized — adolescents are not adults. Adolescents are less capable and less responsible than adults, and more in need of protection and support.

II

ADOLESCENTS WHO COMMIT MURDER SUFFER FROM SERIOUS PSYCHOLOGICAL AND FAMILY DISTURBANCES WHICH EXACERBATE THE ALREADY EXISTING VULNERABILITIES OF YOUTH

Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and

²³ Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 *Vita humana* 11, 30 (1963). See Rest, Davison & Robbins, *supra* note 5, at 276-77; Kohlberg & Gilligan, *supra* note 5, at 1072; Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 402 (M. Hoffman & L. Hoffman, eds. 1964).

development. It is well established that these disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.²⁴

Psychiatrists and psychologists have learned that adolescents who commit murder frequently come from families that are extremely chaotic and fail to provide the necessary support and direction for their children.²⁵ Furthermore, adolescents who commit murder almost invariably have a family background that includes extreme physical abuse and intrafamily violence.²⁶ Many homicidal adolescents have also been sexually abused.²⁷

These young people then are often victims of, and witnesses to, significant violence during their childhood and adolescence. The violence is often sustained, repetitive, and characterized by extraordinary brutality and sadism.²⁸ Their family environment

²⁴ See generally Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homicide: Review of 72 Cases*, *Behavioral Sciences & the Law*, Vol. 5, No. 1, at 11 (1987); Cornell, Benedek & Benedek, *Juvenile Homicide: Prior Adjustment and a Proposed Typology* (paper presented at the American Psychiatric Association Annual Meeting, Washington, D.C.) (1986); *The Aggressive Adolescent: Clinical Perspectives* (C. Keith ed. 1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

²⁵ See, e.g., Ratner, *A Case of Child Abandonment - Reflections on Criminal Responsibility in Adolescence*, 13 *Bull. Am. Acad. Psychiatry Law* 291 (1985); Haizlip, Corder & Ball, *The Adolescent Murderer*, in *The Aggressive Adolescent: Clinical Perspectives* 126, 129-34 (C. Keith ed. 1984); M. Rutter & H. Giller, *supra* note 24, at 180-91; Corder, Ball, Haizlip, Rollins & Beaumont, *Adolescent Parricide: A Comparison with Other Adolescent Murder*, 133 *Am. J. Psychiatry* 957 (1976).

²⁶ See, e.g., Haizlip, Corder & Ball, *supra* note 25, at 130-34; Straus, *Family Training in Crime and Violence*, in *Crime and the Family* 164, 183 (A. Lincoln & M. Straus eds. 1985); Sendi & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 *Am. J. Psychiatry* 423, 427 (1975); Silver, Dublin & Lourie, *Does Violence Breed Violence? Contributions from a Study of the Child Abuse Syndrome*, 126 *Am. J. Psychiatry* 404, 407 (1969).

²⁷ See, e.g., Haizlip, Corder & Ball, *supra* note 25, at 130-34; Straus, *Domestic Violence and Homicide Antecedents*, *Bull. N.Y. Acad. Med.*, Vol. 62, No. 5, at 446 (1986); Sendi & Blomgren, *supra* note 26, at 427.

²⁸ See, e.g., Lewis, Shanok, Pincus & Glaser, *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 18 *J. Am. Acad. Child Psychiatry* 307, 315-18 (1979); Sendi & Blomgren, *supra* note 26 at 427.

is one in which violence is portrayed as the ultimate problem-solver. The use of physical aggression is considered an acceptable way of dealing with others.²⁹

This systematic exposure to violence affects a young person in a number of ways. First, violence becomes a style of behavior against which a child or adolescent is apt to model his or her own behavior. Second, the persistent abuse engenders deep-seated feelings of rage which are often acted upon against other people.³⁰ Finally, a child who is physically battered can suffer significant trauma to the brain which results in increased impulsivity and volatility.³¹

Adolescents who commit murder also frequently have severe cognitive limitations. They tend to be intellectually immature and educationally deficient. These adolescents have significant impairments in judgment and are unable to perceive the consequences of their actions. These cognitive limitations are often linked to learning disabilities and neurological damage. Homicidal aggression in adolescents is also strongly associated with psychiatric problems.³²

Together, these factors — exposure to violence, cognitive limitations, and psychiatric and neurological problems — exacerbate

²⁹ See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Lewis, Shanok, Grant & Ritvo, *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, 140 Am. J. Psychiatry 148 (1983).

³⁰ See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Haizlip, Corder & Ball, *supra* note 25, at 130; Lewis, Shanok, Grant & Ritvo, *supra* note 29, at 152-53; Paperny & Deisher, *Maltreatment of Adolescents: The Relationship to a Predisposition Toward Violent Behavior and Delinquency*, *Adolescence*, Vol. 18, No. 71, at 499 (Fall 1983); Silver, Dublin & Lourie, *supra* note 26, at 407; see also M. Wolfgang & F. Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* 160 (1967) ("aggression is a learned response, socially facilitated and integrated").

³¹ See, e.g., Lewis, Moy, Jackson, Aaronson, Restifo, Serra & Simos, *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 Am. J. Psychiatry 1161, 1165-66 (1985); Lewis, Shanok, Grant & Ritvo, *supra* note 29, at 152-53; Lewis, Shanok, Pincus & Glaser, *supra* note 28, at 314; Bender, *Children and Adolescents Who Have Killed*, 116 Am. J. Psychiatry 510 (1959).

³² See, e.g., Lewis, Shanok, Pincus & Glaser, *supra* note 28, at 313-18.

the already existing vulnerabilities of normal adolescence. Added to a normal adolescent's generally limited ability to appreciate the consequences of his or her actions and to take into account societal values in choosing a course of action, an adolescent who kills is handicapped further by impairment in cognitive ability. Added to a normal adolescent's susceptibility to the influence of family members and peers, an adolescent who kills is surrounded by an atmosphere of violence in which the norm not only tolerates but encourages violence and trivializes its consequences. And finally, added to the emotionality and egocentrism of adolescence, an adolescent who kills is often afflicted with neuropsychiatric disorders which further heighten already intensified emotions and which can create serious misperceptions concerning the relationship between himself or herself and the external world.

A. A Study of Adolescents on Death Row Confirms Their Seriously Impaired Development

In the only clinical study of individuals on death row in the United States who committed capital offenses when they were under the age of 18, researchers have found that as a group these juveniles suffer from the neuropsychiatric, psychoeducational and family disturbances generally characteristic of adolescents who commit homicide (the "Study").³³

The 14 subjects of this interdisciplinary study consisted of all adolescents sentenced to death in four states. They were selected for

³³ Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psychiatry 584 (1988) (This study was originally presented as a paper at the 34th Annual Meeting of the American Academy of Child and Adolescent Psychiatry, October 1987.)

The authors of the Study are: Dorothy Otnow Lewis, M.D., Professor of Psychiatry, New York University School of Medicine, Clinical Professor of Psychiatry, Yale University Child Study Center; Jonathan H. Pincus, M.D., Professor and Chairman of the Department of Neurology, Georgetown University; Barbara Bard, Ph.D., Professor of Special Education, Central Connecticut State University; Ellis Richardson, Ph.D., Research Associate Professor of Psychiatry, New York University School of Medicine; Leslie Prichep, Ph.D., Associate Professor of Psychiatry, New York University School of Medicine; Marilyn Feldman, M.A. in Psychology; and Catherine Yeager, M.A., Research Assistant, Department of Psychiatry, New York University School of Medicine.

the study solely on the basis of their age at the time of the capital offense. They are therefore reasonably believed to be representative of the adolescent offender death row population as a whole.³⁴

The subjects were given comprehensive psychiatric, psychological, neurological, educational and electroencephalographic examinations. The psychiatric examination consisted of a thorough interview covering topics such as medical history, history of neuropsychiatric symptoms, and family and social history, including history of physical and sexual abuse. Careful mental status examinations³⁵ were performed, and detailed neurological histories were obtained by a psychiatrist and a neurologist. Additionally, any historical evidence of central nervous system trauma was corroborated through physical examinations, record reviews, and specialized tests such as the electroencephalogram. Finally, a standard neurological examination was conducted and a battery of psychological, neuropsychological, and educational tests was administered.³⁶

The Study found serious and wide-ranging disturbances in *all* of the subjects. All 14 suffered head injuries during childhood, nine of the injuries were severe enough to result in hospitalization, indentation of the cranium, or loss of consciousness. Furthermore, the neurological and electroencephalographic data revealed that nine of the subjects had serious neurological abnormalities, including evidence of brain injury and electroencephalographic findings suggestive of a previously undiagnosed seizure disorder.³⁷

The Study also found that seven of the subjects were psychotic at the time of their evaluations and/or had been so diagnosed in earlier childhood. An additional four subjects displayed histories consistent with severe mood disorders. The three remaining subjects suffered from disturbed thinking, characterized by periodic

³⁴ *Id.* at 585.

³⁵ The mental status examination is a cross-sectional inventory of a patient's current behavior, symptoms, sensorium, and cognitive faculties. See Ginsberg, *Psychiatric History and Mental Status Examination*, in 1 *Comprehensive Textbook of Psychiatry* 487 (H. Kaplan & B. Sadock 4th ed. 1985).

³⁶ Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *supra* note 33, at 585.

³⁷ *Id.*

paranoia. Thus, all 14 exhibited psychiatric disturbances. Seven suffered from psychiatric disturbances that first appeared in early or middle childhood.³⁸ In all cases, psychopathology antedated the crimes for which the subjects were sentenced to death.³⁹

The psychoeducational testing done in the Study further indicates that at least nine of the subjects experienced significant brain impairment and lacked the ability to formulate abstract concepts. Moreover, 12 subjects had I.Q. scores below 90.⁴⁰ The Study concludes that the majority of these individuals have serious deficiencies in abstract reasoning and function well below the expected levels for their ages.⁴¹

The Study reveals that these adolescent offenders had been repeatedly and brutally physically and sexually abused, often by more than one family member. Furthermore, alcoholism, drug abuse, psychiatric treatment and psychiatric hospitalization were prevalent in the histories of their parents.⁴²

The Study concludes that individuals condemned to death in the United States for crimes committed in their youth are multi-handicapped. They generally have suffered serious central nervous system injuries, have suffered since early childhood from psychotic symptoms, and have been physically and sexually abused. These significant disturbances inhibit natural development, exacerbate the existing vulnerabilities of youth, and contribute to the violent behavior demonstrated by these adolescents.⁴³

Furthermore, the physical and sexual abuse experienced by these adolescents contributes to their crimes. First, the multiple batterings suffered by these adolescents may have actually caused brain

³⁸ *Id.*

³⁹ Psychopathology refers to "disordered psychologic and behavioral functioning (as in a mental disease)." Webster's Third New International Dictionary 1833 (1968).

⁴⁰ An I.Q. score of 100 is considered average. A person with an I.Q. score below 90 falls into the bottom twenty-five percent of other individuals of the same age in the United States. See D. Wechsler, *The Wechsler Intelligence Scale for Children - Revised* 25 (1974); D. Wechsler, *The Wechsler Adult Intelligence Scale - Revised Manual* 27 (1980).

⁴¹ Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *supra* note 33, at 585-86.

⁴² *Id.* at 586-87.

⁴³ *Id.* at 587-88.

injury which would result in increased impulsivity and volatility. Second, the severe parental violence that they experienced functioned as a model for their behavior. Third, the extreme, irrational brutality to which these adolescents were exposed engendered rage which was displaced onto other individuals in their environment.⁴⁴

Finally, the Study suggests that the multiple disturbances which contributed to the violent behavior that these adolescents displayed also contributed to the harshness of the sentences they received. According to the Study, these adolescents uniformly tried to hide evidence of their cognitive deficits and psychotic symptomatology.⁴⁵ Also, both they, and often their attorneys, tried to conceal or minimize their parents' brutality towards them.⁴⁶ It is ironic that the very factors which could function as mitigating circumstances instead remain hidden at the time of the sentencing. It is noteworthy that much of the clinical information revealed in this Study had apparently not been previously uncovered during the course of each individual adolescent's case. The Study reports that of these 14 subjects "in only five cases were any pretrial evaluations performed at all. These tended to be perfunctory and provided inadequate and inaccurate information regarding the adolescents' neuropsychiatric and cognitive functioning."⁴⁷ In sum, the clinical and legal services necessary to uncover and respond to the significant medical, psychological and social abnormalities suffered by adolescents on death row are simply unavailable.⁴⁸

B. Both Petitioners Exhibit the Same Characteristics as the Subjects of the Adolescent Death Row Study

Petitioner Heath Allen Wilkins is an extremely disturbed young person who has spent much of his life in various mental institutions.⁴⁹

⁴⁴ See *supra* notes 30-31 and accompanying text.

⁴⁵ Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *supra* note 33, at 587-88.

⁴⁶ *Id.* at 588.

⁴⁷ *Id.*

⁴⁸ *Id.* at 589.

⁴⁹ It is very rare for a child to be psychiatrically hospitalized or placed in a residential treatment facility. For example, the National Institute of Mental Health reports that in 1980 only approximately 1 child in 1,000 was psychiatrically hospitalized and only approximately 3 children in 10,000 received residential treatment. NIMH, *Mental Health, United States* Pub. No. 85-1378 (C.A. Taube & S.A. Barrett eds. 1985).

(footnote continued)

(W.J.A. at 39-45; W. Tr. at 249-50.)⁵⁰ He has suffered from serious psychiatric and emotional disorders since early childhood. (W.J.A. at 68; W. Tr. at 272.) The record establishes that Heath has exhibited psychotic symptoms and bizarre behaviors throughout his adolescence and childhood. (W.J.A. at 43, 68; W. Tr. at 235.) His thinking has frequently been described as illogical, confused and paranoid. (W.J.A. at 40, 43, 47, 60, 61, 68.)⁵¹ Heath has been described as "borderline" or "schizotypal," and has been "diagnosed as suffering from schizophrenia." (W.J.A. at 40, 43, 50, 67-68.) Furthermore, Heath has required treatment with antipsychotic medications. (W.J.A. at 43, 59, 67.) In addition, Heath has suffered from severe depression since he was at least nine years old, leading him to make numerous suicide attempts. (W.J.A. at 46, 60; W. Tr. at 265.)

Heath's uncle introduced him to drugs while he was still in kindergarten. (W.J.A. at 29, 57; W. Tr. at 261.) Heath has abused alcohol and various drugs, including "gasoline, glue, pot, uppers and downers," since age five or six. (W.J.A. at 67.) In addition, he has used LSD quite frequently since age 10. (W.J.A. at 67.) Heath's history of severe drug abuse could only have exacerbated his deep-seated problems. Furthermore, the record indicates that Heath's drug abuse may very well have caused him to suffer serious neurological damage. (W.J.A. at 29.)

Both Heath's brother and his father also have a history of psychiatric illness. Heath's father was committed to a mental institution. (W.J.A. at 41.) His brother was also psychiatrically hospitalized and diagnosed as schizophrenic. (W.J.A. at 61.)⁵²

These forms of treatment are reserved for the most disturbed children in our society. Heath's extended institutionalization in such facilities demonstrates the severity with which his symptoms were regarded.

⁵⁰ References preceded by "W.J.A." are to the Wilkins Joint Appendix. References preceded by "W. Tr." are to the Wilkins trial transcript.

⁵¹ There is also evidence in the record that Heath experienced auditory and visual hallucinations (W.J.A. at 30.).

⁵² Severe mental illness in first degree relatives is significant because such psychotic disorders as schizophrenia tend to run in families and vulnerabilities to them are thought to be inherited. Weiner, *Schizophrenia: Etiology*, in 1 *Comprehensive Textbook of Psychiatry* 653, 655 (H. Kaplan & B. Sadock 4th ed. 1985). In fact, Heath's psychiatric records suggest that his illness may have a genetic component. (W.J.A. at 47.)

Heath's family environment was very chaotic, disturbed and destructive. His father left the family when Heath was very young. According to records, Heath's father was violent and abusive in the family. (W.J.A. at 41.) Heath was also abused by his mother and his mother's boyfriend. Heath's mother sometimes had violent outbursts that led her to beat Heath for two hours at a time. (W.J.A. at 28, 57; W. Tr. at 261.) Heath was also sexually abused. (W.J.A. at 31; W. Tr. at 261.) Heath's family was so lacking in support that in the weeks preceding the crime for which he was sentenced to death he was not allowed in the house by his mother and was essentially homeless and without any kind of adult support. (W. Tr. at 272.)

Thus, Heath has been exposed to a constellation of psychological, physical and environmental disturbances which have disrupted his natural growth and development. He has suffered from profound psychiatric, emotional and social limitations. Furthermore, Heath has been a victim of extreme abuse and neglect.⁵³ He is typical in every way of adolescents on death row as a group.⁵⁴ Under these circumstances, it shocks the conscience that Heath was permitted to waive counsel, represent himself and seek the death penalty. The death penalty in this case "only serves to bury and cover up the failures of our existing social and penal programs." *State v. Wilkins*, 736 S.W.2d 409, 423 (Mo. banc 1987) (Welliver, J. dissenting).

Petitioner Jose Martinez High also is similar to the adolescents on death row studied by Dr. Lewis and her colleagues.⁵⁵ Jose had apparently functioned adequately until the tenth grade when he suddenly failed everything. (H.H.C. Tr. at 57.)⁵⁶ He became possessed by certain fantasies, developed disciplinary problems and "seemed alienated from the entire adult world." (H.H.C. Tr. at 42, 58.) One of his teachers stated that "Jose may well have been profoundly and emotionally disturbed . . . with deeper problems than 95% of our students . . . [He] was desperate for

⁵³ See *supra* notes 24-32 and accompanying text.

⁵⁴ Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 588-89.

⁵⁵ *Id.*

⁵⁶ References preceded by "H.H.C. Tr." refer to the High State Habeas Corpus Transcript.

attention and definitely begging for psychological counseling." (H.H.C. Tr. at 60.) This dramatic change in Jose's behavior, as well as the observations of his teachers, suggest the onset of a psychiatric illness. Unfortunately no one was available to help Jose with his problems. (H.H.C. Tr. at 60.)

Within a mere two years of the onset of these psychological problems Jose committed the crime for which he has been sentenced to death. Jose has apparently never been afforded a comprehensive psychiatric and neurological evaluation. Without such an examination we do not know how closely Jose resembles the increasingly clear picture of death row inmates who committed capital crimes in their adolescence. Based on the limited record, however, and the nearly universal characteristics found in the juvenile death row study, amici believe that a complete and thorough examination of Jose High would likely reveal the same psychological, educational and environmental disturbances found in adolescents on death row as a group.⁵⁷

III

THE EXECUTION OF AN INDIVIDUAL WHO WAS UNDER AGE 18 AT THE TIME OF THE CAPITAL OFFENSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

The Eighth Amendment, which applies to the states through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This Court has determined that a punishment is "cruel and unusual" if it is excessive. *Weems v. United States*, 217 U.S. 349 (1910). It is excessive if it is disproportionate to the crime or to the individual's moral culpability for that crime, or if it makes no measurable contribution to acceptable goals of punishment. *Enmund v. Florida*, 458 U.S. 782, 800 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). A punishment is also impermissible if it offends society's "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

⁵⁷ Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 588-89.

(plurality opinion); *Thompson v. Oklahoma*, ____ U.S. ____, 108 S. Ct. 2687, 2691 (1988) (plurality opinion).

Although the Court has determined that the death penalty is not inherently cruel in violation of the Eighth Amendment, *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), it has recognized the extraordinary nature of the punishment:

[E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, Brennan and Marshall, JJ., concurring in part and dissenting in part) (collecting cases); see also *California v. Ramos*, 463 U.S. 992, 998-99 at n.9 (1983) (collecting cases). Indeed,

[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).

The question raised herein is whether death is ever an appropriate punishment for an individual who was under the age of 18 at the time he or she committed a capital offense. The answer to this question must be *no*. The fundamental differences between adolescence and adulthood, distinctions universally recognized by the medical and social sciences, as well as the law, make this irrevocable form of punishment both excessive as applied to youths and offensive to contemporary standards of decency.

In determining whether the death penalty is a permissible punishment for a particular category of offenders, this Court must

consider the available objective indicators of contemporary standards of decency, such as legislative enactments and jury determinations. The analysis, however, does not stop there. This Court has consistently observed that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Thompson v. Oklahoma*, 108 S. Ct. at 2692 n.8 (plurality opinion) (quoting *Coker v. Georgia*, 433 U.S. at 597). See also *Enmund v. Florida*, 458 U.S. at 797. In exercising that judgment here, this Court first must ask whether adolescents are sufficiently morally culpable to suffer the penalty of death, and then consider whether the application of the death penalty to adolescents measurably contributes to the social purposes ostensibly served by the death penalty. *Thompson v. Oklahoma*, 108 S. Ct. 2692 (plurality opinion). The answers to these two questions are informed by the teachings of psychiatrists, psychologists and other adolescent development experts. This Court must bring this body of knowledge to bear as it makes its own considered judgment regarding the constitutionality of capital punishment for adolescents.

A. Capital Punishment Is Cruel and Unusual As Applied to Adolescents Because Adolescents Lack the Requisite Moral Culpability

This Court has repeatedly recognized that the appropriateness of the death penalty depends upon the moral culpability of the offender or category of offenders. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion); *California v. Brown*, ____ U.S. ____, 107 S. Ct. 837, 840 (1987) (O'Connor, J., concurring) ("punishment should be directly related to the personal culpability of the criminal defendant"); *Tison v. Arizona*, ____ U.S. ____, 107 S. Ct. 1676, 1683 (1987). The vast body of clinical research and literature demonstrates that adolescents lack the experience, judgment, psychological development, and fully formed character of adults. Thus, adolescents cannot be equated with adults with respect to their eligibility for the death penalty. Capital punishment for adolescents is cruel and unusual because it is grossly out of proportion to adolescents' moral culpability.

The fact that a separate system of criminal justice has evolved for adolescents is ample evidence that the death penalty, as applied to adolescents, is disproportionate.

The very existence of a dual criminal justice system is evidence of a two-fold societal judgment that children do not bear the same degree of responsibility for their antisocial behavior as adults and therefore should not be subject to the harsh penalties of criminal trial and penal incarceration; and juvenile delinquents are, by virtue of their youth, responsive to rehabilitative treatment.⁵⁸

Inherent in the law are the basic beliefs that (i) youths should not be punished as severely as adults because they are not as culpable as adults for their offenses; and (ii) youths by nature are receptive to treatment and rehabilitation.

The disparate treatment of youth in the law is fully supported by the clinical evidence about adolescent development. As described in Point I, adolescents are still growing socially and psychologically. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion). Furthermore,

adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.⁵⁹

⁵⁸ S. Fox, *The Juvenile Court: Its Context, Problems and Opportunities* 11-13 (1967).

⁵⁹ Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 47 (1978). ("Task Force")

Thus, execution must be regarded as a disproportionate form of punishment as applied to adolescents. Their diminished responsibility for their acts justifies the added measure of tolerance that exists in the law. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion) ("[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."). Because adolescents are not expected to conform their behavior to adult standards, it is inappropriate to inflict on them a form of punishment intended only for society's most serious and incorrigible offenders. The ability of adolescents to adjust and improve as they mature further demonstrates the inappropriateness of inflicting on adolescents the ultimate punitive sanction of death.

B. Capital Punishment Is Cruel and Unusual As Applied to Adolescents Because It Serves No Legitimate Penological Purpose

The death penalty ostensibly serves two acceptable goals of punishment: deterrence and retribution. *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.). Because inflicting the death penalty on youthful offenders makes no measurable contribution to either goal, its application to them is cruel and unusual punishment, "nothing more than the purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. at 592 (plurality opinion).

1. The Death Penalty Does Not Deter Adolescents From Committing Capital Offenses

In commenting upon the lack of empirical evidence to support or rebut the theory that capital punishment has a deterrent effect, Justice Stewart observed:

We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Gregg v. Georgia, 428 U.S. at 185-86 (joint opinion of Stewart, Powell, and Stevens, JJ.). In light of what is known today about adolescent development generally and the development of adolescents who commit homicide in particular, adolescents are unlikely to engage in a meaningful "cold calculus that precedes the decision" to commit a capital offense in which "the possible penalty of death" enters into their decision-making process.

As described above, adolescents generally are more impulsive and less able to appreciate the consequences of their acts than adults. Adolescents also tend to lack a fully developed appreciation of death and its finality. Moreover, while adolescents may be capable of rational decision-making in some areas with the guidance and support of adults, this capacity is significantly lessened when they are placed under highly stressful circumstances.⁶⁰

Such circumstances are abundant with respect to homicidal adolescents. These adolescents typically grow up in a chaotic family environment, are exposed to violence and abuse throughout their childhood, and tend to be impeded in their natural development by the adults upon whom they must rely for protection and support. They also suffer from cognitive limitations which further impair their ability to make sound judgments. These factors are particularly damaging during adolescence because it is at this stage of development that human beings are especially vulnerable and awkward. While adolescents may look like and possess many of the physical attributes of adults, they do not yet think or behave like adults. The violent nature of adolescents who kill is a predictable consequence of the combination of (i) their incomplete human development which has been further hindered by an unstable and violent childhood, and (ii) the rapid physical changes which they are undergoing.

It is thus demonstrably wrong to conclude that the death penalty deters adolescents who commit capital offenses. Adolescents

⁶⁰ In sum, although some youths' involvement in delinquency may be related to cost-benefit decisions and to a rational process, other explanations better explain the delinquent behavior of most youths. With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process. C. Bartollas, *Juvenile Delinquency* 102 (1985); see also P. Hahn, *The Juvenile Offender and the Law* 40-57 (2d ed. 1978) (free will and rational choice not among various behavioral theories explaining the causes of delinquency).

generally do not engage in any "cold calculus" that would factor in the possibility of a death sentence before they act homicidally. *Thompson v. Oklahoma*, 108 S. Ct. at 2700 (plurality opinion) ("The likelihood that the teenage offender has made the kind of cost/benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."). Emotionality, coupled with a pronounced inability to appreciate or be affected by the knowledge of the consequences of their actions, leads adolescents to commit capital offenses. Free will and rational calculation are generally absent in these circumstances.

2. Retribution Is Not a Legitimate Penological Purpose With Respect to Adolescents

The penological goal of retribution has two components: (1) the desire that offenders suffer the punishment they deserve, and (2) the desire for vengeance. See *Gregg v. Georgia*, 428 U.S. at 183-184 (joint opinion of Stewart, Powell, and Stevens, JJ.). Whether these concerns are satisfied is again contingent upon the degree of the offender's responsibility for the offense. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 107 S. Ct. at 1683. "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion), the retribution rationale is simply inapplicable to the execution of adolescents.

Adolescents, like adults, should pay for their crimes. However, "[t]he juvenile justice system, while holding minors responsible for their misconduct . . . acknowledges that the level of juvenile responsibility is lower than for adults."⁶¹ It is thus excessive to inflict the penalty of death on adolescents.

Neither of the concerns of retribution is satisfied by executing youthful offenders. The punishment of death is too severe because adolescents are not as responsible as adults. In addition, the disparate legal treatment of adolescents is ample evidence that society is less vengeful with respect to youthful offenders.

Retribution is also contrary to the principal legitimate purpose of punishing the young: rehabilitation. Traditional methods of

⁶¹ Task Force at 47.

punishing youthful offenders are based upon a presumption that young persons are more amenable to positive change than adults. In fact, this presumption is well-documented. Consequently, the finality and irrevocability of the death penalty makes such punishment manifestly inappropriate for adolescents.

a. Adolescents Are Less Responsible Than Adults For Their Offensive Acts

Adolescents are developmentally different from adults in ways that diminish their level of responsibility for their actions. Point I documents the inexperience, impulsiveness and emotionality of youth. Adolescents have a greater tendency than adults to act in disregard of the potentially serious and harmful consequences of their acts. Even when they are aware of such consequences, they are more prone than adults to act in spite of them.

[T]he American adolescent, struggling with the biological and psychological pressures of youth, seeks status and reassurance in the company of his peers. Rebellion against parental authority and restrictions is combined with pressure to conform to the expectations of other adolescents. The teen years are a period of experiment, risk taking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures.⁶²

This Court has taken note of these developmental distinctions, observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. at 635. See *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion). This fundamental concept of youth forms the basis for state laws which commonly prohibit minors from possessing alcohol in public, from voting, from sitting on a jury, and from marrying without parental consent.

[T]he experience of mankind, as well as the long history of our law, recognize[s] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original). It also justifies disparate treatment for

⁶² *Id.* at 3.

adolescents under the First,⁶³ Fourth,⁶⁴ and Fourteenth⁶⁵ Amendments. This same concept of youth also warrants less severe punishment. See *supra* at 20-21.

Furthermore, as shown in Point II, adolescents who commit capital offenses are even less responsible for their acts than adolescents generally. Such adolescents tend to lack the support and protection ordinarily provided youths by parents and other family members. In addition, their families are frequently violent and abusive. These factors are further aggravated by psychiatric problems from which homicidal adolescents frequently suffer. As a result of these factors, the natural maturation process is seriously inhibited. The emotional growth and development of adolescents who are homicidal is, in effect, stunted.

The death penalty is thus too severe a punishment for adolescent offenders. Because an adolescent has not yet fully developed emotionally and psychologically, and because an adolescent who commits a capital offense tends to be even more developmentally limited, the execution of such an individual is by definition a greater punishment than he or she deserves.

⁶³ E.g., *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (state law forbidding sale of sexually explicit but non-obscene material to persons under 17 years of age does not violate First Amendment because "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

⁶⁴ E.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (schoolchild's Fourth Amendment right against unreasonable search and seizure and his legitimate expectation of privacy must give way to school's legitimate need to maintain appropriate educational environment).

⁶⁵ E.g., *Schall v. Martin*, 467 U.S. 253 (1984) (state law authorizing preventative detention of accused juvenile delinquents does not violate their Fourteenth Amendment rights if serious risk of subsequent crime exists, because, although juveniles' liberty interest is strong under Fourteenth Amendment, juveniles, unlike adults, require some form of custody).

Notably, in *Schall* the Court observed:

Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae*" interest in preserving and promoting the welfare of the child."

Id., at 265 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

b. Vengeance Is Antithetical to the Lawful Treatment of Adolescents

Society's moral obligation to protect its young is indisputable. As Justice Frankfurter observed in *May v. Anderson*, 345 U.S. 528, 536 (1953) (concurring opinion): "Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Youth and its inherent characteristics — immaturity, vulnerability, inexperience and dependency — place the concept of revenge at odds with the lawful treatment of the young. Thus,

[t]he spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.⁶⁶

As described *supra* at 24, youths are defined as less responsible for their acts by state legislatures and the courts. In addition to a host of both legislatively and judicially imposed restraints on the rights and liberties of adolescents, both state and federal laws provide distinct rules and procedures for the prosecution of youths. Under both state and federal law, many acts which constitute crimes if committed by adults instead constitute acts of "juvenile delinquency" if committed by adolescents. See, e.g., *State In Interest of D.B.S.*, 137 N.J. Super. 371, 349 A.2d 105 (1975).

Society's responsibility to protect and nurture the young is also well supported by legal precedent. This obligation is perhaps best reflected in the Court's longstanding recognition of the guiding role parents play in the upbringing of children.⁶⁷ In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that although a state's interest in compulsory education for its children is indeed strong, it must give way to parents' "traditional interest" in raising children. *Id.*

⁶⁶ Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613, 637 (1983).

⁶⁷ Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. at 166.

at 214. Similarly, when it comes to deciding whether a child is to be committed to a state mental hospital, the Court has stated that it is up to the parents to decide, notwithstanding the child's clear "liberty interest" not to be confined without due process.

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. . . . *Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.*

Parham v. J.R., 442 U.S. 584, 602-603 (1979) (emphasis supplied).

Vengeance cannot therefore serve as a legitimate penological goal with respect to adolescents — even adolescents who commit capital offenses. The diminished culpability of adolescents, coupled with society's obligation to protect the young, warrants a measure of constitutionally imposed tolerance sufficient to bar their execution.

c. Retribution Is Contrary to Rehabilitation, the Principal Legitimate Goal of Punishing Adolescents

Retribution is contrary to rehabilitation, which is the primary goal of punishing the young. E.g., *In the Matter of the Appeal in Maricopa County, Juvenile Action No. J-84536-S*, 126 Ariz. 546, 617 P.2d 54, 56 (1979) ("the most deeply rooted concept in juvenile court philosophy is that the purpose of the system is to rehabilitate and not to punish"); *Rust v. Alaska*, 582 P.2d 134 (Alaska 1978) (express purpose of juvenile jurisdiction is rehabilitation rather than punishment). The reason for this objective is not hard to discern: "[I]ncorrigibility is inconsistent with youth . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

The existence of a juvenile justice system under both state and federal law which treats youthful offenders more leniently than adults demonstrates the importance society places on the goal of rehabilitation with respect to adolescents.⁶⁸ For example, the purpose

⁶⁸ See generally A. Platt, *The Child Savers: The Invention of Delinquency* (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909).

of the Federal Juvenile Delinquency Act, 18 U.S.C §§ 5031-5042 (West 1985), "is to be helpful and rehabilitative rather than punitive . . ." *United States v. Hill*, 538 F.2d 1072, 1074 (4th Cir. 1976). Under the Act, "a juvenile is accorded preferential and protective handling not available to adults accused of committing crimes." *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir.), *cert. denied*, 449 U.S. 987 (1980).

Greater tolerance toward youthful offenders is justified by their heightened capacity for change, growth and improved behavior. As described *supra* at 7, adolescents are generally more receptive and responsive to rehabilitative treatment. More specifically, "juvenile murderers tend to be model prisoners and exhibit a very low rate of recidivism when released."⁷⁶ Putting adolescents to death is therefore without any legitimate penological justification.

C. The Execution of Adolescents Is Unconstitutional in Light of Contemporary Human Knowledge About Adolescents Generally and Adolescents Who Commit Capital Offenses in Particular

This Court has consistently recognized that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on a particular category of offenders. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion) (quoting *Enmund v. Florida*, 458 U.S. at 797). The "broad, vague terms [of the Eighth Amendment] do not yield to a mechanical parsing . . ." *Thompson v. Oklahoma*, 108 S. Ct. at 2698 n.40 (plurality opinion).

Thus, Eighth Amendment analysis is "flexible and dynamic." *Gregg v. Georgia*, 428 U.S. at 171 (joint opinion of Stewart, Powell, and Stevens, JJ.). Whether the infliction of a particular punishment is inherently cruel and unusual is subject to periodic review, which must give due consideration to "contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962). Contemporary human knowledge respecting adolescent development generally and the nature of adolescents who commit capital offenses in particular indicates that the ultimate sanction of death is an inappropriate form of punishment for such persons for the reasons described herein.

⁷⁶ Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Cleve. St. L. Rev. 363, 395 (1987) (citing Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 De Paul L. Rev. 23, 32-34 (1976)); D. Hamparian, R. Schuster, S. Diniz & J. Conrad, *The Violent Few* 52 (1978); T. Sellin, *The Penalty of Death* 102-20 (1982).

The developmental differences between adolescents and adults are alone sufficient to justify a constitutional ban on the execution of individuals who commit capital offenses while under the age of 18. It is offensive to contemporary standards of decency to commit to death individuals who, because of their lack of maturity, exist in the law as persons who are incapable of making legally binding decisions in certain matters and who are often accorded disparate treatment for acts which would be regarded as criminal if they were adults. The reason for these distinctions is clear: Youths "cannot be judged by the more exacting standards of maturity." *Haley v. Ohio*, 332 U.S. 596, 599 (1948). These same distinctions justify a degree of leniency in the manner in which adolescents who commit capital offenses are punished. The ultimate punitive sanction of death is just too harsh.

However, the analysis need not end there. As shown in Point II, youths who commit capital offenses typically suffer from a variety of serious natural and environmental disabilities. In addition to exhibiting all of the attributes which make youths vulnerable by nature, adolescents who kill are deficient intellectually, emotionally, psychologically and frequently neurologically. Their impairment is aggravated by parents or legal guardians who fail to provide much needed support at a critical stage in their lives, and indeed, who typically provide negative influences. The individuals on death row who were minors when they committed capital offenses exhibit these deficiencies.⁷⁷

The execution of persons who commit homicide while under the age of 18 is therefore far more offensive as actually applied than it is in the abstract as applied to the universe of adolescents. The commission of a homicide by an adolescent is a reflection of a multitude of serious and complex problems from which the adolescent suffers. Such youths almost invariably have been deprived of a stable, healthy environment in which to develop. Nor could they rely upon adults to exercise rational judgment on their behalf. Most significantly, however, the law has provided them little practical recourse. Adolescents who commit homicide are legally subject to the will of and reliant upon adults who typically contribute substantially to the adolescents' impairment.

⁷⁷ It is no response to say that all these factors are considerations that can be introduced as mitigating evidence at the penalty phase of a capital trial under *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. Clearly *Lockett* was an insufficient check inasmuch as these individuals were sentenced to death despite their substantial impairment.

The most fundamental concepts of fairness are thus implicated by the execution of persons who have committed homicide in their adolescence. They lack not only the maturity necessary to be accorded the full panoply of civil rights and liberties afforded adults, but also the protective support and guidance from responsible adults who are legally authorized to impose their will upon them. The death penalty should not therefore be inflicted on adolescents because it is cruel and unusual punishment and excessive as applied to them.

CONCLUSION

The execution of individuals who committed capital offenses while under the age of 18 is inherently cruel and unusual in violation of the Eighth Amendment. Therefore, this Court should vacate petitioners' death sentences, and remand their cases for the imposition of life sentences.

Respectfully submitted,

/s/JOSEPH T. McLAUGHLIN

JOSEPH T. McLAUGHLIN
Counsel of Record

JEREMY G. EPSTEIN
HENRY WEISBURG
KENNETH A. FREELING
STEVEN M. PINCUS

SHEARMAN & STERLING
153 East 53rd Street
New York, New York 10022
(212) 848-4000
Attorneys for Amici Curiae

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JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER ZANT, Warden,

Respondent.

HEATH A. WILKINS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
AND TO THE SUPREME COURT OF THE STATE OF MISSOURI

**BRIEF OF THE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION AND THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

*CHARLES OGLETREE
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-5097

JOHN H. BLUME
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-0650

Attorneys for Amici Curiae

* *Counsel of Record*

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STATEMENT OF INTEREST OF AMICI CURIAE¹

The National Legal Aid and Defender Association (NLADA) is a non-profit organization with a membership of 2,300 legal aid and defender offices employing approximately 25,000 professionals, and, in addition, over 1,000 individual members. NLADA's primary purpose is to assist in providing effective legal services to persons, including juveniles, unable to retain counsel in criminal and civil proceedings.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers, including representatives of every state. NACDL was founded over

¹ This brief is filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the Court.

twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual and human rights and the improvement of the criminal laws, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment to the United States Constitution. Additionally, NACDL has long been concerned with the

treatment of juveniles by the criminal justice system. Therefore, NACDL is very concerned about these cases, which involve the question of whether the Eighth Amendment permits persons under the age of eighteen to be sentenced to death.

SUMMARY OF ARGUMENT

This case presents the question of whether the Eighth Amendment prohibits the execution of persons under the age of eighteen. This Court's prior decisions interpreting the Eighth Amendment's ban against cruel and unusual punishment establish that the Court cannot determine whether a particular punishment violates "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), merely by examining statutory provisions and jury verdicts. Rather, in the final analysis, this Court

must exercise its own independent judgment in order to determine whether we may sentence our children to death.

In utilizing its independent and informed judgment, the Court must consider the lessened moral responsibility that is inherent in adolescents. Because the moral culpability of persons under the age of eighteen is intrinsically less than that of adults, capital punishment serves no legitimate penological interest when imposed upon them; the state's interests in retribution and deterrence are not furthered by the execution of teenagers. Thus the death penalty is an excessive punishment for persons under the age of eighteen, and this ultimate sanction is no longer compatible with our society's evolving standards of decency when applied to such young offenders.

ARGUMENT

I. IN THE FINAL ANALYSIS THIS COURT MUST RELY UPON ITS OWN INFORMED JUDGMENT IN DETERMINING THE CONSTITUTIONALITY OF THE DEATH PENALTY FOR JUVENILES.

The Eighth Amendment prohibits the infliction of any punishment which is "cruel and unusual."² Although this Court has determined that the death penalty is not cruel and unusual punishment per se, Gregg v. Georgia, 428 U.S. 153 (1976), it

² In construing the Eighth Amendment's prohibition against cruel and unusual punishment, this Court has determined that a punishment is "cruel and unusual" if it is excessive. Weems v. United States, 217 U.S. 349 (1910). An excessive punishment is one which is disproportionate to the crime, or which makes no measurable contribution to any acceptable goal of criminal punishment. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 173 (1976). A punishment is also constitutionally impermissible if it offends the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Ford v. Wainwright, 477 U.S. 399, 406 (1986); Enmund v. Florida, 458 U.S. 782 (1982).

has held that the death penalty violates the Eighth Amendment when imposed, under any circumstances, upon certain categories of offenders, see Ford v. Wainwright, 477 U.S. 399 (1986) (Eighth Amendment prohibits execution of the currently insane), or for certain categories of offenses, see Enmund v. Florida, 458 U.S. 782 (1982) (Eighth Amendment prohibits capital punishment for felony-murder where offender did not personally kill or intend that lethal force be used); Coker v. Georgia, 433 U.S. 584 (1977) (Eighth Amendment prohibits capital punishment for crime of rape of adult woman).

In deciding whether the death penalty is a permissible punishment for either a particular category of offenders or for a particular offense, the Court has examined what objective evidence is available that reflects whether the punishment is

compatible with our society's evolving standards of decency. However, the Court has consistently recognized that in the final analysis it must determine whether the Eighth Amendment tolerates a particular sentencing practice. Thus in Coker v. Georgia, 433 U.S. at 597, the Court stated: "[R]ecent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy [over the death penalty for rape], for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." The essentially independent nature of the Court's judgment was reaffirmed in Enmund v. Florida, 458 U.S. at 797³: "Although the

³ See also Thompson v. Oklahoma, U.S., 108 S.Ct. 2687, 2692, n.8 (1988) (quoting Coker for the proposition

judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty [upon the particular category of offenders in question]."

In examining whether the death penalty for juveniles under the age of sixteen was an unconstitutionally excessive punishment, see Thompson v. Oklahoma, __U.S.__, 108 S.Ct. 2687 (1988), the Court focused primarily upon certain available objective criteria, such as legislative enactments and jury verdicts. The plurality concluded, based upon a review of the relevant statutory provi-

that the Supreme Court's own judgment must ultimately be used in the interpretation of the Eighth Amendment); see generally Robinson v. California, 370 U.S. 660 (1962) (Court relied on its independent judgment in determining that Eighth Amendment did not permit criminalization of drug addiction).

sions and jury verdicts, that the imposition of the death penalty upon those under sixteen violated the Eighth Amendment. See Thompson, 108 S.Ct. at 2692-98. Justice O'Connor suggested that more input from state legislatures was necessary, 108 S.Ct. at 2706-11, while the dissenters were convinced that there was no constitutional violation, 108 S.Ct. at 2711-27. Amici agree that an examination of the particular objective indicia of societal consensus relied upon by the plurality in Thompson is informative. However, the question of whether the Eighth Amendment sanctions capital punishment for minors--for those under the age of eighteen--cannot be reduced to a statistical exercise.

In Coker v. Georgia, for example, the Court examined objective measures of societal practice relating to the execu-

tion of persons convicted of rape. While finding that those measures pointed to a consensus that the death penalty was an excessive punishment for the crime of rape,⁴ the majority went on to conduct its own, separate analysis--an analysis which "requires the exercise of judgment, not the reliance upon personal preferences." Trop v. Dulles, 356 U.S. at 103 (holding unconstitutional punishment of desertion through loss of citizenship). A similar analysis must be made by the Court in determining the constitutionality of capitally punishing children under the age of eighteen. Thus although measures such as legislative actions, jury verdicts,⁵

⁴ See Coker, 433 U.S. at 591-97.

⁵ Although jury verdicts are generally considered to be a reflection of contemporary community standards, juries in capital cases do not reflect the whole array of opinion within any community. The process of death-qualification, which the Court has allowed for state's

and public opinion polls, are indicators of our societal standards, they do not determine the constitutional question presented. This Court must ultimately bring its own judgment to bear in determining whether our evolving standards of decency endorse the execution of those under the age of eighteen.

The Eighth Amendment was drafted by the framers with the clear understanding that this Court would shoulder the burden of authoritatively determining the

enforcement of their capital statutes, see Lockhart v. McCree, 476 U.S. 162 (1986), unquestionably eliminates from juries all those who cannot consider the use of death as punishment. An examination of jury verdicts is thus an examination of what only part of the community believes is appropriate. That part of the community which would not consider the imposition of a death sentence--a part which must be taken into account in any assessment of contemporary standards of decency--is thus excluded when jury verdicts are examined. The fact that such a small number of juveniles have been sentenced to death by such juries is, accordingly, quite impressive.

constitutional validity of punishments as the nation progressed. Weems v. United States, 217 U.S. 349, 378 (1910). The decisions interpreting the Amendment's prohibition of cruel and unusual punishment have repeatedly recognized its evolutionary character. In Weems, the Court, discussing the flexibility of constitutional interpretation with respect to the Eighth Amendment, stated: "The clause of the Constitution ... may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 378 (citations omitted). A half-century later, the Court reaffirmed Weems' holding, recognizing that "the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving

standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 100-01. More recently, the Court recognized that "[t]he Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency..., ' against which we must evaluate penal measures," Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); see also Ford v. Wainwright, 477 U.S. at 406. The execution of juveniles as we approach the 1990s is inconsistent with our current enlightened sense of humane justice and would greatly undermine the evolving standards of decency that mark the progress of our maturing society.

For this Court to be able to carry out its duty of interpreting the Eighth Amendment in a "flexible and dynamic

manner," Gregg v. Georgia, 428 U.S. at 171, it must inevitably look not only to objective data but past that, to its own considered collective judgment. Its searching examination of the broad and idealistic precepts of the Eighth Amendment requires more than a statistical survey of sentencing practices; rather it requires an enlightened mind turned toward "what may be." Weems, 217 U.S. at 373. Such informed and considered judgment requires no less than a broad vision of what we as a society make ourselves out to be, and cannot be avoided by the totaling of arithmetical columns.

This broad vision, moreover, is not dependent on the subjective beliefs of individual Justices, but rather rests upon other indicia--depending of course on the category of persons involved--of the acceptability of sentencing those persons

to death. In order to properly resolve the question presented in this case, whether it is permissible to execute minors, it is imperative that the Court not exclusively focus on the decisions of various legislatures, judges and juries. To do so is to fail to realize that this Court serves a unique function in our constitutional scheme. The Court, insulated by constitutional design from the community pressures that are inherent in any capital murder case and partisan politics, must decide whether children are sufficiently morally culpable to suffer the penalty of death. Therefore, as the ultimate arbiter of the meaning of the Eighth Amendment, it is essential that the Court do more than calculate the "numbers" provided by juries and legislatures in the

various states.⁶ Although the Court's independent judgment is--and should be--informed by the objective data, the ultimate issue of the constitutionality of a particular punishment is not compelled by this evidence.

Furthermore, an exclusive focus upon statutes and verdicts does not lead to a fully informed decision in the determination of whether it is consistent with our evolving standards of decency to execute minors. In fact, such an approach ignores significant evidence critical to an enlightened understanding of why those under the age of eighteen should not be sentenced to death. To exclusively focus on the objective indicia of societal

⁶ This is necessarily so. If the Court were to simply defer to legislative enactments and jury verdicts it would not be exercising its own independent judgment, thus making the Court's own Eighth Amendment analysis redundant to an examination of objective indicia.

standards primarily relied upon in Thompson fails to adequately consider germane social science evidence--the work of health professionals, educators, psychologists, and the like--pivotal to the Court's exercise of its informed judgment as to the constitutionality of executing persons under the age of eighteen.

II. A CONSIDERATION OF THE MORAL BLAMEWORTHINESS OF JUVENILES SHOULD LEAD THE COURT TO CONCLUDE THAT NEITHER OF THE TWO PRINCIPAL PURPOSES OF THE DEATH PENALTY ARE MET BY THE EXECUTION OF JUVENILES

The Court has repeatedly recognized that the determination of whether the death penalty is an appropriate punishment--either for an individual offender or for a particular category of offenders--is essentially an inquiry into moral blameworthiness. See Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529, 2533 (1987);

Enmund v. Florida, 458 U.S. 782, 798 (1982).⁷ As was noted in Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, J., concurring in part and dissenting in part), "in the final analysis, capital punishment rests on not a legal but an ethical judgment--an assessment of what we called in Enmund the 'moral guilt' of the defendant." 468 U.S. at 481 (quoting Enmund, 458 U.S. at 800-01). In California v. Brown, ___U.S.____, 107 S. Ct. 837 (1987), it was noted that "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the

⁷ In a number of prior decisions the Court has held that the Eighth Amendment forbids both barbarity and excessiveness of punishment in relation to the crime committed. See Coker, 433 U.S. at 592. Excessive punishments are those that: (1) "involve the unnecessary and wanton infliction of pain," Gregg, 428 U.S. at 173; or (2) are "grossly out of proportion to the severity of the crime." Gregg, 428 U.S. at 173.

defendant.... 107 S.Ct at 840 (O'Connor, J., concurring); see also Franklin v. Lynaugh, ___U.S.____, 108 S.Ct. 2320, 2332 (1988) ("the principle underlying Lockett, Eddings, and Hitchcock is that punishment should be directly related to the personal culpability of the criminal defendant") (O'Connor, J., concurring). This is so because the question of whether an individual offender or category of offenders receive their just deserts for a crime can only be determined by assessing their moral blameworthiness in light of the legitimate constitutional purposes of capital punishment. See Tison v. Arizona, ___U.S.____, 109 S.Ct. 1676, 1683 (1987).

The legitimate penological interests that have been accepted by the Court for capital punishment are deterrence and retribution. Ultimately, the Eighth Amendment issue turns on the courts'

independent judgment of whether the death penalty as "applied to those in [petitioners'] position measurably contributes" to the "two principal social purposes ... [of] retribution and deterrence of capital crimes by prospective offenders.'" Enmund v. Florida, 458 U.S. at 798 (quoting Gregg v. Georgia, 428 U.S. at 153). If sentencing a particular offender or category of offenders to death does not further at least one of these two objectives, then the death penalty cannot be imposed consistent with the Eighth Amendment.⁸ Examining those goals of retribution and deterrence in light of the lessened moral

⁸ "Unless the death penalty when applied to those in [petitioners'] position measurably contributes to one or both of [the two societal goals of retribution and deterrence], it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund v. Florida, 458 U.S. at 798 (quoting Coker, 433 U.S. at 592).

culpability of juveniles as a class, it is clear that the Eighth Amendment proscribes the execution of persons who were under the age of eighteen at the time of the commission of the crime.

A. Society's interest in retribution is not furthered by sentencing juveniles to death.

For society to seek retribution for a crime, the criminal must possess a sufficient degree of culpability or responsibility for that criminal act. In California v. Brown, Justice O'Connor stated:

[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in Eddings, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual."

455 U.S. at 110. Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasonable moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

107 S.Ct. at 841 (O'Connor, J., concurring); see also Tison v. Arizona, 109 S.Ct. at 1683 ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); Booth v. Maryland, 107 S.Ct. at 2533 (capital sentencing is essentially an inquiry into a defendant's "personal responsibility and moral guilt").

When assessing the culpability of juvenile offenders, the Court has recognized in various circumstances that their "moral guilt" is far less than that of mature, morally responsible adult crimi-

nals. As Justice Stevens wrote for the plurality in Thompson, "the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." 108 S.Ct. at 2698 (footnote omitted).⁹ Our

⁹ The Court has noted in a number of decisions the lesser culpability of juveniles. See, e.g., May v. Anderson, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect.") (Frankfurter, J., concurring); Carey v. Population Services International, 431 U.S. 678, 693 n. 15 (1977); Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("[M]inors often lack the experience, perspective, and judgment" of adults); Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) ("Our history is replete with laws and judicial recognition that minors ... are less mature and responsible than adults."); New York v. Ferber, 458 U.S. 747, 757 (1982). For example, the Court has noted:

The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel

society's most absolute and terrible penalty must be reserved for those who know a fully-developed morality and who then transgress that morality. However, it is excessive for individuals who, as a result of their youth, have a morality that is inchoate and whose culpability is thus significantly lessened.¹⁰⁴

where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent.

H. L. v. Matheson, 450 U.S. 398, 421-22 (1981) (Stevens, J., concurring) (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part)).

¹⁰ In this regard, it is important to note that the United States is the only western democracy--and one of the few nations in the world--that presently permits the execution of offenders who were under the age of eighteen at the time the crime was committed. See Brief of Amicus Curiae Amnesty International for Petitioner in Thompson v. Oklahoma and these cases.

As established by both the legal limitations placed on the civil rights of those under eighteen and social science, a lessened degree of moral blameworthiness is inextricably caught up in what it means to be a juvenile. This Court has noted that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors ... generally are less mature and responsible than adults." Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (footnote omitted).¹¹ Youths under eighteen years

¹¹ See also Eddings, 455 U.S. at 115, n.11 ("Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's

of age face numerous legal restrictions on the rights of citizenship granted to others: for example, they may not vote, they may not drink alcoholic beverages, they may not serve on juries, they may not drive, they may not gamble, and they may not buy pornography. All of these restrictions recognize the societal consensus and common knowledge that a lessened responsibility is a concomitant of being young. In fact, every state has a comprehensive and separate juvenile justice system to deal with those of lessened culpability. See Kent v. United States, 383 U.S. 541, 554 n.19 (1966).

Moreover, the psychological makeup of the young weighs against using retribution

fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." (quoting Twentieth Century Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978)).

as a rationale for executing them.¹² The turbulence of the adolescent years, which are generally considered to last from age eleven at least through age eighteen,¹³ is caused by the onset of puberty and the transition to formal, logical modes of thinking from more reactive, concrete ways

¹² "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." Thompson, 108 S.Ct. at 2699.

¹³ See Hamburg & Wortman, Adolescent Development and Psychopathology, in 2 Psychiatry ch. 4 (J. Cavenar ed. 1985). It is critical to a proper resolution of the issue presented in these cases to recognize that the psychological makeup which results in the lessened moral blameworthiness of youth often extends beyond age eighteen into the early twenties. Building on this recognition, for example, many states do not permit those under the age of twenty-one to consume alcohol. Age eighteen, therefore, is a conservative assessment--rather than a liberal one--of the point at which an individual is sufficiently culpable to be sentenced to death.

of thinking.¹⁴ Adolescence is marked by the relative absence of moral judgment and principles that characterize the thought patterns of adults.¹⁵ Juveniles do not possess the experience or the grounding to be able to formulate a holistic moral universe, and they are dependent upon others, especially older relatives and friends, for moral guidance. Needless to say, the mental and social backgrounds of juveniles who have murdered are rarely healthy.¹⁶

¹⁴ See B. Inhelder & J. Piaget, The Growth of Logical Thinking from Childhood to Adolescence (1958).

¹⁵ See Kohlberg & Gilligan, The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World, *Daedalus* 1051 (Fall 1971).

¹⁶ In one study of fourteen randomly selected juveniles under the age of eighteen who had been sentenced to death, all fourteen were found to have suffered significant head injuries in childhood, nine were found to have serious neurological abnormalities, seven were diagnosed as psychotic, twelve had been

B. Deterrence fails as a rationale for executing juveniles because they lack the faculties for cold, deliberate calculation.

In Enmund v. Florida, this Court emphasized that capital punishment will only serve as a deterrent when "premeditation and deliberation" have preceded the capitally-punishable crime. Enmund, 458 U.S. at 799 (quoting Fisher v. United States, 328 U.S. 463 (1946) (Frankfurter, J., dissenting)). Those who murder in a flash of rage or on a sudden impulse will not be constrained from killing by a death penalty that is far from their thoughts prior to the crime. Neither will those who have no understanding of death or who lack the capacity to predict the conse-

severely physically abused by family members, and five had been sodomized by older male relatives. Lewis, Pincus, Bard, Richardson, Pritchep, Feldman and Yeager, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 14 *Am. J. Psychiatry* 584, 588 (1988).

quences of their actions be deterred. Because it is precisely those under the age of eighteen who are most likely to kill under circumstances such as these, deterrence is not a valid rationale for executing adolescents.

Just as the changes we undergo in our adolescent years generate a rootless moral framework, they also cause teenagers to become more restless, impulsive and prone to risk-taking.¹⁷ This impulsiveness is due to adolescents' dawning ability to reason in the abstract, which opens up new possibilities of experimentation. However, the urge to experiment is combined with a lack of experience and an inability to predict the possibly detrimental conse-

¹⁷ "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Thompson, 108 S.Ct. at 2700.

quences of their actions. All of these factors create in the adolescent mind a desire to try out reckless activities, such as fast driving, promiscuous sex, and drug and alcohol abuse. Due to teenagers' inexperience in predicting consequences, their impulsiveness is generally unaccompanied by fear of death or personal harm.¹⁸

Being unafraid of death, in fact, is integrally related to the adolescent mindset. Studies of suicide in adolescence show that teenagers often do not comprehend that death is different or that death could happen to them; "only old people die." In fact, suicide is the third leading cause of death among this

¹⁸ See Irwin & Millstein, Bio-psychosocial Correlates of Risk-Taking Behaviors, 7 J. Adolescent Health Care, No. 6S (Nov. 1986 Supp.).

age group.¹⁹ Threatening to execute someone who is not afraid of being dead is a futile exercise and serves no valid penological purpose.

Finally, although it is of course true that if a particular teenager is executed, that particular teenager will not have an opportunity to kill again, specific deterrence is not a valid justification for executing teenagers. Juveniles convicted of murder and incarcerated have been overwhelmingly shown to be model prisoners and very rarely commit further crimes after incarceration.²⁰ By

¹⁹ See Sheras, Suicide in Adolescents, in Handbook of Clinical Child Psychology 759, 769-770 (C. Walker and M. Roberts eds. 1983); see also Kastenbaum, Time and Death in Adolescence, in The Meaning of Death 99 (H. Feifel ed. 1959); Fredlund, Children and Death from the School Setting Viewpoint, 47 J. School Health 533 (1977).

²⁰ See Vitello, Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v.

definition, they are young, are capable of rehabilitation, and may benefit from some of the social services unavailable to them prior to prison. However, "[c]apital punishment of our children inherently rejects humanity's future, which rests with the habilitation and rehabilitation of today's youth." Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 395 (1987) (footnote omitted). Thus, a deterrent that does not deter juveniles should not be applied against them, as it furthers no constitutionally valid societal interest, and is "nothing more than the purposeless and needless imposition of pain and suffering." Coker, 433 U.S. at 592.

United States, 26 De Paul L. Rev. 23, 32-34 (1976).

CONCLUSION

In resolving the constitutional question presented in this case--whether the Eighth Amendment sanctions the imposition of the death penalty upon those under the age of eighteen--this Court's decision is not delimited by the actions of various legislatures, judges and juries. In the final analysis, this Court must bring to bear its own judgment in order to determine if our evolving standards of decency permit the execution of our children. The Court's independent judgment is not standardless, however, but rather is informed by examining the intrinsic characteristics of juveniles in light of the valid constitutional purposes of capital punishment. Such an examination in this case reveals that the imposition of the death penalty upon the very young--those under the age of

eighteen--serves no legitimate penological purpose and thus violates the Eighth Amendment. Therefore, the Court should vacate the sentences of death in these cases and remand them for the imposition of sentences of life imprisonment.

Respectfully submitted,

*CHARLES OGLETREE
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-5097

JOHN H. BLUME
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEYS FOR AMICI CURIAE

* Counsel of Record

Nos. 87-5666, 87-6026

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Supreme Court, U.S.

FILED

SEP 3 1988

JOSEPH F. SPANIOL, JR.
CLERK

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER ZANT, WARDEN,

Respondent.

HEATH A. WILKINS,

Petitioner,

vs.

STATE OF MISSOURI

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
AND TO THE SUPREME COURT OF THE STATE OF MISSOURI

**BRIEF OF THE AMERICAN BAPTIST CHURCHES;
THE AMERICAN FRIENDS SERVICE COMMITTEE;
THE AMERICAN JEWISH COMMITTEE;
THE AMERICAN JEWISH CONGRESS;
THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST);
THE MENNONITE CENTRAL COMMITTEE;
THE GENERAL CONFERENCE MENNONITE CHURCH;
THE NATIONAL COUNCIL OF CHURCHES;
JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL
ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA);
THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE;
THE UNION OF AMERICAN HEBREW CONGREGATIONS;
THE UNITED CHURCH OF CHRIST COMMISSION FOR
RACIAL JUSTICE; THE UNITED METHODIST CHURCH
GENERAL BOARD OF CHURCH AND SOCIETY; AND
THE UNITED STATES CATHOLIC CONFERENCE
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

(For Appearances, See Reverse Side of Cover)

MARK EVAN OLIVE*
1010 San Luis Road
Tallahassee, Florida 32304
(904) 575-9073

* *Counsel of Record*

MARY CHARLOTTE McCALL
1210 San Luis Road
Tallahassee, Florida 32304
(904) 575-5070

Attorneys for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici listed and described below are national religious bodies, judicatories, or organizations of the Protestant, Catholic, and Jewish faiths.¹ Amici believe that whatever one may think of the imposition of capital punishment generally, and we oppose it, the notion of executing children shocks the conscience. While Amici endorse many of the arguments presented in petitioners' and in the other amicus briefs, we present herein additional arguments distinctive to our own interests. Amici are interested in the issue before the Court because of:

(1) a conviction that children are uniquely redeemable and rehabilitatable,

¹ Amici file this brief in support of petitioners by written consent of all parties pursuant to rule 36.2 of the Rules of the Court. The parties' letters of consent are on file with the Clerk of the Court.

they are capable of rapid and profound positive change, and their capacity for growth is the primary factor to be considered by society in assessing punishment for their antisocial acts;

(2) a conviction that since children have not fully achieved that degree of maturation which society requires of them before designating them "adults," and since their actions involve a lesser culpability than similar actions by adults, a lesser degree of punishment should be imposed for them than for adults who commit similar acts;

(3) a fundamental conviction that protection, nurture, education, moral development, and preparation of children for responsible adulthood is the most important task appropriately chosen by those responsible for children's care;

(4) a common and traditional

calling to be intimately involved with society in positive ways so as to discover and advance the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), and to help ensure that the criminal justice system reflects those standards;

(5) a recognition that it is Amici's responsibility when the Court explores the national consensus regarding the legal and moral decency of executing children, to provide the Court with the religious community's collective experiences with adolescents, which counsels against their execution;

(6) united opposition to the imposition of capital punishment because it is cruel and unusual and because capital punishment as it is applied in the United States is contrary to the

highest -- and even the simplest -- moral teachings of our traditions; and

(7) Amici's remorse that execution of children -- the casting out of those most dependent upon society's care-- ignores, distorts, and corrupts law's basic inclination toward justice.

Amici are:

1. THE AMERICAN BAPTIST CHURCHES IN THE U.S.A. (NATIONAL MINISTRIES) consists of 5,800 churches with a membership of 1.6 million.² The American Baptist Churches are deeply concerned with the moral, spiritual and emotional growth of children, who occupy a very special place in our ministry. In addition, in 1958 and 1966, the American Baptist

² Membership numbers are approximate and have been either provided by the respective amicus from current records or taken from C. H. Jacquet, Jr., ed., The Yearbook of American & Canadian Churches: 1987 (New York: Abingdon Press, 1987).

Convention, a representative body of the Church, adopted a resolution, subsequently affirmed by the American Baptist Churches in 1980 and 1982, calling for the abolition of capital punishment, in part based on the conviction that "the emphasis in penology should be upon the process of creative, redemptive rehabilitation, rather than on primitive retribution."

2. THE AMERICAN FRIENDS SERVICE COMMITTEE (AFSC), as an expression of the Religious Society of Friends (Quakers) in America, since 1917 has been active in works of humanitarian relief and service. The AFSC has a vital interest in this litigation because of Friends' historic and continued advocacy for the rights of children and adolescents, because of our recognition of their profound potential for rehabilitation, and because of our

opposition to the taking of human life by the State.

3. THE AMERICAN JEWISH COMMITTEE (AJC) is an organization of some 50,000 members which was founded in 1906, primarily to protect the civil and religious rights of Jews. The AJC is deeply committed to assuring liberty and justice for all Americans as the surest guarantee of the rights of all minorities. In 1972, the AJC issued a statement in opposition to the imposition of capital punishment. In July 1988, the AJC issued a statement directly related to this case: "Whatever one may think of capital punishment generally ... the notion of executing children shocks the conscience."

4. THE AMERICAN JEWISH CONGRESS is an organization of 50,000 members formed in 1918 to protect the economic, civil,

religious, and political rights of Jews in the United States. At its Biennial Convention in 1968, the American Jewish Congress adopted a resolution on capital punishment opposing its imposition based on the Congress' desire to "approach the problem of crime from both a rational and a deeply religious commitment."

5. THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST) has 4,214 churches with membership of 1.1 million. The Church is especially concerned with protecting and nurturing youth. In 1973, the General Assembly, a voting representative body of the Church, approved a resolution opposing the imposition of capital punishment and instead "favoring a program of rehabilitation for criminal offenders...."

6. THE MENNONITE CENTRAL COMMITTEE (MCC), founded in 1920, is the

cooperative relief and social service agency of North American Mennonite and Brethren in Christ Churches representing 300,000 members. MCC has a long-standing concern for youth reflected in its many programs working with youth. Mennonites have also been involved in criminal justice issues, including death penalty issues, for many years, having ministered to victims and families of victims as well as to offenders. The MCC's opposition to the death penalty, which dates back to the 17th century, is based in part on its belief that "true justice is created through restitution and reconciliation, not retribution." "Statement on the Death Penalty," adopted at MCC U.S. Peace Section meeting, December 4, 1982.

7. THE GENERAL CONFERENCE MENNONITE CHURCH was formed in 1860 uniting

Mennonites interested in doing missionary work. It consists of 211 churches with a membership of 36,000. In 1965, the General Conference Mennonite Church at its triennial conference resolved to "be more faithful ... in laboring ... for the correction of spiritual, economic, and social conditions which contribute to the making of juvenile offenders...." They further adopted a position in opposition to the imposition of capital punishment, finding that execution is a "repudiation of the rehabilitative aspect of the state's own task and function ... " and "removes [the offender] forever from the realm of the church's redemptive ministry."

8. THE NATIONAL COUNCIL OF CHURCHES is a "community of communions" composed of 32 national religious bodies in the United States having an aggregate

membership of 40,000,000. The Council is governed by a Governing Board of 265 members elected by the member communions in proportion to their size and support of the Council. The Governing Board adopts policy statements and resolutions that express its views on moral and spiritual issues and govern the operation of the program units of the Council. Among these have been three statements in opposition to the death penalty, adopted in 1968, 1976, and 1979. The 1968 Policy Statement adopted unanimously, was based in part on the "Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution." The Governing Board is especially concerned with adolescents and their special rehabilitative potential, as reflected in a "Resolution on Jails, Prisons and the Courts," adopted in 1972.

9. JAMES E. ANDREWS AS THE STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA): As the senior continuing officer of the General Assembly, the Stated Clerk is authorized "to retain legal counsel and institute or participate in legal proceedings." The General Assembly is the highest governing body of the Church, and represents the unity of the Presbyterian Church (USA) as a national Christian denomination with 3 million members organized into more than 11 thousand congregations. Through its antecedent religious bodies, The Presbyterian Church (USA) has existed as an organized religious denomination since 1706. Participation in this brief is based upon policy decided by the General Assembly following a process which provides for study and comment throughout the denomination. In 1974, the General

Assembly of the United Presbyterian Church (USA), urged that "a major concern of the church be the needs and rights of children ... [and] development of policies which ensure their full growth and development ... including the protection of their legal and civil rights." The United Presbyterian Church (U.S.A.) General Assembly in 1977, affirmed the position of the 171st General Assembly (1959) "that as Christians we must seek redemption of evil doers and not their death, and that the use of the death penalty tends to brutalize the society that condones it," and similarly the Presbyterian Church in the United States in its statement on Capital Punishment concluded that "[t]rue human justice which reflects the justice of God ... can only seek to maintain and preserve life -- the life of those who

threaten the lives of others as well as the lives of those who are threatened."

10. THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE is a non-profit civil rights organization founded in 1957 by Dr. Martin Luther King, Jr. and other ministers with the stated purpose of redeeming the soul of America by furthering Christian values and upholding the rights of the poor. SCLC has 90 chapters and 50,000 members across the country. Throughout the course of its history, SCLC has conducted workshops and seminars, held rallies and demonstrations and passed resolutions opposing the death penalty. SCLC holds that the death penalty is racially and economically biased and is merely a tool of oppression. Furthermore, it is the conviction of SCLC that juvenile executions are immoral, unethical and un-

Christian.

11. THE UNION OF AMERICAN HEBREW CONGREGATIONS represents 800 Reform congregations with a membership of over 1.3 million Jews in the United States. Its congregations and national affiliates have a broad range of program and policy activities in the area of children's rights grounded in a commitment to their proper care, nurture, and development. The UAHC has long been involved in issues of social and criminal justice and has for decades expressed its views in opposition to capital punishment on humanitarian, religious, moral, and human rights grounds.

12. THE UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE of the 1.7 million member United Church of Christ was created in the early 1960s to increase the involvement of the Church in

the continuing struggle for racial justice on a national level and to help develop new policies and practices to meet the needs of racial and ethnic communities across the United States. United Church of Christ has 6,400 churches with a membership of 1.6 million. The Church is especially interested in the obligations of society to its children. In 1979, the 12th General Synod of the UCC reaffirmed the declarations of earlier Synods in opposition to the death penalty, "opposition [that] is based on our understanding of the Christian Faith and the New Testament's call to redemptive love, mercy, and sanctity of life...."

13. THE UNITED METHODIST CHURCH GENERAL BOARD OF CHURCH AND SOCIETY is an instrumentality of the United Methodist Church; its purpose is to further the

work of the church in the sphere of social affairs. The United Methodist Church has 38,000 churches with 9.2 million members. The Social Principles of the United Methodist Church are an effort by the Church to speak to human issues from a sound biblical and theological foundation. Social Principle III, The Social Community, emphasizes that "children are ... acknowledged to be full human beings in their own right, but beings to whom adults and society in general have special obligations." The 1980 General Conference reaffirmed its opposition to the imposition of capital punishment, stating, "The United Methodist Church cannot accept retribution or social vengeance as a reason for taking human life. It violates our deepest belief in God as the creator and the redeemer of humankind,"

and in 1984, further stated, "Capital punishment ... is contrary to our belief that sentences should hold within them the possibility of reconciliation and restoration."

14. THE UNITED STATES CATHOLIC CONFERENCE is a civil entity of the American Catholic Bishops assisting them in service to the Church where voluntary, collective action is needed. In 1968, the U.S. Catholic Conference Committee on Social Development and World Peace issued its statement on capital punishment, stating, "The critical question for the Christian is how we can best foster respect for life, preserve the dignity of the human person and manifest the redemptive message of Christ. We do not believe more deaths are the response to the question." In 1974, the Catholic bishops declared their opposition to

capital punishment, and that opposition was reaffirmed in 1980. The Statement of the Bishops noted that "infliction of the death penalty extinguishes possibilities for reform and rehabilitation of the person ... as well as the opportunity for the criminal to make some creative compensation for the evil he or she has done. It also cuts off the possibility for a new beginning and of moral growth in a human life which has been seriously deformed."

SUMMARY OF ARGUMENT

This Court's treatment of children has been consistent and simple -- children receive special protection in the law because they are special in society, possessing a unique character blend that combines inexperience, lack of insight, and lack of perspective, Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982),

with an amazing "capacity for growth," Thompson v. Oklahoma, ___ U.S. ___, 108 S. Ct. 2687, 2699 (1988). Children and adolescents are not miniature adults, and because of their nature, they are reprieved from adult responsibility and deprived of adult privilege. All of this the law demands, because of common sense and the teachings of the ages. These Amici believe and will show that because of these considerations, there is a societal and legal consensus that youth ought to be treated differently than adults for all punishment purposes.

These Amici are particularly well-suited to inform the Court of the evolving standards of decency in society with respect to the execution of the young. Religious organizations are heavily relied upon by society to participate in child-rearing, family

counseling, and the inculcation of moral values. Indeed, the preparation of adolescents for adulthood is one of religion's highest callings. Through this endeavor, these Amici have first-hand experience with the qualities that make the young special.

Their most compelling quality is that children are redeemable and rehabilitatable. This quality defines adolescents' daily reality, as the young literally can change overnight. While children and adolescents are not adults, they do become adults, after a difficult and turbulent passage. The capacity to change, the inclination toward majority, and the ability to be rehabilitated--these characteristics identify children as different, and provide part of the impetus for the moral consensus that rejects their execution. (Argument 1).

Nothing is gained and all is lost by extinguishing the life of a youth who commits a crime. Rehabilitation ought to be the paramount penological goal, especially with children, and in all other areas dealing with children, it is. Execution, of course, pretermits rehabilitation. Other penological goals are similarly ill-served by execution of the young. Retribution -- giving a law-breaker what he or she deserves -- is misplaced in the adolescent context. Adolescents, almost by definition, possess reduced culpability for their acts, and do not "deserve" the ultimate sanction. Deterrence is removed as a legitimate reason for execution by another defining characteristic of adolescents -- immaturity. Adolescents do not, indeed cannot, fully foresee the consequences of their actions. That is

why society does not allow them to vote, marry, or stay out late.

For these and other reasons, there is a national moral consensus against execution of the young. All members of the Court agree that at some age, execution is cruel and unusual punishment. That age should be set at 18, an age that is firmly entrenched in this society as the time of passage from childhood to adulthood, the time at which responsibilities attach and disabilities are shed. Professional organizations uniformly select age 18 as the execution limit, and legislators increasingly do so. Age 18 is perhaps the most settled line drawn in this country for separating children from adults, and its utility in other contexts counsels for its use here.

(Argument II)

These Amici reject execution as a

proper punishment in any case. It is especially horrible in the case of the young. Children are protected for reasons too basic to question, and it defies logic to protect the young from themselves and others in all but this most demanding of circumstances. Just as this Court has positioned itself between children and harm innumerable times, the moral consensus is, for the same reasons, against the execution of children. Children are redeemable, and their execution is cruelty for the sake of cruelty.

ARGUMENT

I. THERE IS A SOCIETAL MORAL CONSENSUS THAT IT IS SINGULARLY INDECENT TO EXECUTE ADOLESCENTS, WHOSE INHERENT REDEEMABILITY AND DISABLING IMMATURITY DISTINGUISH THEM FROM ADULTS

Minors "have a very special place in life," May v. Anderson, 345 U.S. 520, 536 (1953), which law reflects and respects.

Thompson v. Oklahoma, ___ U.S. ___, 108 S. Ct. 2687, 2709 (1988) (O'Connor, J., concurring) ("Legislators recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults.") A "very special place" is also reserved for children in all religious communities, see Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), and for many of the same "policy" reasons -- minors make mistakes because of their immaturity, but they are specially redeemable. Because of "the lesser culpability of the juvenile offender, [and] the teenager's capacity for growth," Thompson, 108 S. Ct. at 2699 (plurality opinion), law -- religion's and society's -- separates children from

adults respecting both rights and responsibilities.

This common ground concerning adolescents shared by law and religion provides the religious community with an unusual opportunity and a unique duty to provide the Court with "evidence of societal standards of decency," Thompson, 108 S. Ct. at 2710 (O'Connor, J., concurring), which "mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958) with respect to punishment of youthful offenders. Amici will demonstrate that "as public opinion [has] become[] enlightened by a humane justice," Weems v. United States, 217 U.S. 349, 374 (1910), a moral consensus has emerged that recognizes that the execution of an individual who committed an offense when he or she was under eighteen years old is indefensible.

Because children and adolescents have great potential for growth, maturation, and thus redemption, their execution is nothing short of "the gratuitous infliction of suffering," Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), which is not to be tolerated by any, much less an enlightened, society.

A. Amici Are Well Suited To Provide Indicators of Contemporary Standards Of Decency, Especially with Respect To Juvenile Executions.

1. Religious Groups Are Traditionally Relied Upon by Framers of Public Policy.

The religious community traditionally has played a pervasive and dominant role in the formation of the American social conscience. Churches and synagogues have insistentlly and persuasively called not only upon their own people but also upon all citizens to

form a more just and humane society.³ Not content merely to reflect the mores and prejudices of the imperfect human community, religious leaders -- both clergy and lay -- have represented, articulated, and reflected the impulse of the human spirit towards justice, compassion, and correct conduct.⁴ The religious community routinely enlivens and enlightens public debate on matters presenting basic issues in American society. Indeed, since the earliest times, religion has been "woven into the

³ Joseph Cardinal Bernardin, Archbishop of Chicago, in a recent presentation before the American Bar Association, noted that "the purpose of the separation of church and state in American society is not to exclude the voice of religion from public debate, but to provide a context of religious freedom where the insights of each religious tradition can be set forth and tested.... To ignore the moral dimension of policy is to forsake our religious heritage." Bernardin, "The Role of the Religious Leader in the Formation of Public Policy," 34 DePaul L. Rev. 1, 5 (1984).

⁴ Id. at 1.

underlying texture of American politics." A.J. Reichley, Religion in American Public Life 169 (Washington, D.C.: Brookings Institute, 1985).⁵

Religion's stewardship of moral values has led to new definitions of what is right and wrong in public policy, flowing from insights voiced by emerging religious movements.⁶ Social reforms in

⁵ "From the standpoint of the public good, the most important service churches offer to secular life in a free society is to nurture moral values that help humanize capitalism and give direction to democracy. Up to a point, participation by the churches in the formation of public policy, particularly on issues with clear moral content, probably strengthens their ability to perform this nurturing function." A.J. Reichley, Religion in American Public Life 359 (Washington, D.C.: Brookings Institute, 1985).

⁶ For example, the Protestant Reformation recast the role of the individual in society, the virtue of non-ecclesiastical occupations, and the right of all persons to search the Scripture for themselves, leading to common public education — the first public schools were in Germany at the behest of Martin Luther. Tsaroff, Radoslav A., The Moral Ideals of Our Civilizations 118 (N.Y.: E.P. Dutton, 1942).

The Wesleyan/Evangelical Revival in Britain

Great Britain in the nineteenth century were brought about because the evangelical impulse, stemming from John Wesley and George Whitefield and their followers, and similarly influential leaders in other religious groups, raised the level of what human beings understood they could and should expect of each

in the 18th century reshaped the social and political structures through legal reforms brought about by evangelical influence. Elie Halévy, 1 A History of the English People in the Nineteenth Century 399-400 (N.Y.: Peter Smith, 1949), quoted in Winthrop Hudson, The Great Tradition of the American Churches 102 (N.Y.: Harper and Bros., 1953). This same evangelical impulse fueled the growing opposition to slavery in Britain and cast opprobrium on the system of transportation of convicts to Australia. Robert Hughes, The Fatal Shore 162, 282 (N.Y.: Alfred A. Knopf, 1987).

Religiously inspired movements have been instrumental in many social reforms in the United States. "[C]hurch and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education." McDaniel v. Paty, 435 U.S. 618, 641 n.25 (1978) (Brennan, J. concurring) (quoting L. Tribe, American Constitutional Law, 1st ed., 866-67).

other. In short, the religious community frequently speaks to policy-makers about evolving standards of decency, policy-makers listen, and public policy changes.

2. Amici Are Especially Well-Suited To Address Society's Commitment To Reserve A Special Place For Juveniles Under The Law.

The central issue presented by the instant cases is also a matter of great social and religious importance -- whether there is a societal consensus that it is morally, and thus constitutionally, offensive to execute adolescents. As this Court has insisted, that inquiry must be determined by reference to the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 365 U.S. at 101. The identifying standard

should not be, or appear to be, merely the subjective views of

individual justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to public attitudes concerning a particular sentence...."

Coker v. Georgia, 433 U.S. 584, 592 (1977). These Amici -- religious judicatories, organizations, and agencies of major Protestant, Catholic, and Jewish denominations in the United States -- are, as in other areas of public policy, in a unique and important position to reflect public attitudes concerning the execution of the young.⁷

⁷ In the twentieth century, the policy statements of religious bodies in the United States and Europe have come to represent the product of a significant and highly developed process that brings together biblical/theological/ social science expertise with representative deliberations. The policy statements generally are the result of a long and careful process of study in which experts from theological, ethical and various technical fields, meeting over a period of years with program specialists in the denominations, research a given problem-area, prepare analyses, and draft proposed policies for the religious body. The result of this process is a well-considered and definitive statement

combining the contributions of experts and the scrutiny and discussion of a widely-representative deliberative process. As such, it represents a deliberate and informed consensus.

Through such deliberative processes, before the end of the last decade, a large majority of religious bodies or organizations in the United States had expressed their opposition to the imposition of capital punishment in the United States. These include:

- American Baptist Church in the U.S.A. (1977)
- American Ethical Union (1976)
- American Jewish Committee (1972)
- American Lutheran Church (1972)
- American Friends Service Committee (1976)
- Christian Church (Disciples of Christ) (1973)
- Christian Reformed Church (1979)
- Church of the Brethren (1979)
- Episcopal Church (1979)
- Friends Committee on National Legislation (1977)
- Lutheran Church in America (1966)
- Mennonite Church (1965)
- National Council of Churches in the U.S.A. (1976)
- Presbyterian Church in the United States
- Reformed Church in America (1965)
- Synagogue Council of America (1971)
- Unitarian Universalist Association (1979)
- United Church of Christ (1979)
- United Methodist Church (1980)
- United Presbyterian Church in the U.S.A. (1977)
- United States Catholic Conference (1978)

"Capital Punishment: What the Religious Community Says" (N.Y.: National Interreligious Task Force on Criminal Justice, Work Group on the Death

Law and society provide special, that is, different, treatment to minors because minors are more rehabilitatable and redeemable than adults. The history of the juvenile justice system in this country reveals that this special treatment for juveniles was prompted, and has been sustained, by the efforts of religious leaders.⁸ The juvenile justice

Penalty, 1978). The Union of American Hebrew Congregations in 1959 took a position opposing the imposition of capital punishment, and in November 1980, the United States Catholic Conference also issued a statement in opposition to capital punishment.

Amici voice their special objections to execution of adolescents and children, objections separate and apart from those voiced to executions in general. While Amici oppose capital punishment in general, we find execution of the young even more abhorrent.

⁸ In both the Old and New Testament, children are treated differently because they are children. The tradition continues. See, e.g., Criminal Justice, The General Board of Church and Society, the United Methodist Church 14 ("The Social Principles of the United Methodist Church call for special attention to the rights of children and youth."); "Political Responsibility: Choices for the 1980s," A Statement of the

system can be traced to two major reforms which occurred during the nineteenth century:

The opening of the New York House of Refuge has been denominated "the first great event in child welfare" in the period before the Civil War. The second reform, probably the better known of the two, was the institution of the juvenile court by the Illinois legislature in 1899.

Fox, S., "Juvenile Justice Reform: An Historical Perspective," 22 Stan. L. Rev. 1107 (1970). The House of Refuge -- which "offer[ed] food, shelter, and education to the homeless and destitute youth of New York, and ... remov[ed] juvenile offenders from the prison company of adult convicts" -- was a project of "Quaker reformers who had gained prominence through earlier works

Administrative Board, United States Catholic Conference, March 22, 1984, 13.

of charity and reform." Id. at 1188-89.⁹ The courts soon followed this religiously inspired movement, adopted "the philanthropic protestations of the reformers," id. at 1204, and the juvenile court system was born. See Kent v. United States, 303 U.S. 541, 554-55 (1966) ("The objectives [of the juvenile

⁹ "Can it be consistent with real justice, that delinquents of this character, should be consigned to the infamy and severity of punishments, which must inevitably tend to perfect the work of degradation, to sink them still deeper in corruption, to deprive them of their remaining sensibility to the shame of exposure, and establish them in all hardihood of daring and desperate villainy? Is it possible that a Christian community can lend its sanction to such a process without any effort to rescue and save?" Society for the Prevention of Pauperism in the City of New York, Report on the Subject of Erecting a House of Refuge for Vagrant and Depraved Young People, reprinted in Society for the Reformation of Juvenile Delinquents, Documents Relative to the House of Refuge 13 (N. Hart ed. 1832) (emphasis added). The House of Refuge was "to effect the moral reformation of delinquents," id. at 11-12, because "[r]eformation is, or ought to be, an object dear to every man who votes for a penal statute. In the cause of the young it is almost everything...." Id. at 33.

court] are to provide resources of guidance and rehabilitation....") Every state now has a juvenile court act, id. at 554 n.19, and this Court has acknowledged the religious "child savers"¹⁰ who prompted the reform.¹¹

In a very real sense, then, this juvenile protection movement, begun and influenced by some of the Amici here (or

¹⁰ Comment, "Capital Punishment for Minors: An Eighth Amendment Analysis," 74 J. Crim. L. & Criminology 1470, 1474 (1983).

¹¹

"[The reformers] were profoundly convinced that a society's duty to the child could not be confined to the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent' but 'what is he, how has he become what he is, and what had best to be done in his interest and in the state's to save him from a downward career.' The child essentially good, as they saw it, was to be made to feel that he is the object of [the state's] care and solicitude...."

In re Gault, 387 U.S. 115 (1967). All juvenile court systems have rehabilitation as their goal. Paulsan, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957).

other religious bodies within their traditions), is responsible for the issue now before the Court. Juveniles have fewer rights but greater protection than adults because the religious community, and thence the legal community, recognized and protected that all-defining characteristic of the young -- their ability to reform, mature, be rehabilitated; in short, their "capacity for growth." Thompson, 108 S. Ct. at 2699. The common religious/legal tenet that lends Amici their special voice in the instant debate arises from the doctrinal cross-currents between modern juvenile law and religion. Rehabilitation and redeemability¹² are virtually

¹² "The Christian concern is redemptive." John Howard Yoder, "The Death Penalty: A Christian Perspective," in Capital Punishment Study Guide 14 (Winnipeg, Manitoba: Victim Offender Ministries, Mennonite Central Committee Canada, 1980, repr. 1985). In Jewish thought, this concept is understood as "Teshuvah," which

synonymous in the juvenile context, and adolescents, more than any other group, possess this religious, cultural, behavioral, and legal characteristic.¹³

B. Execution of Persons Who Were Minors At The Time Of The Commission Of The Offense Violates Contemporary Standards Of Decency -- Youth Are Different.

This nation has manifested a great

embodies the notion that everyone is capable of making atonement for mistakes and creating a better future. The Jewish High Holy Day of Yom Kippur is an annual day of atonement, a day in which to make atonement for the mistakes of the past year, receive forgiveness from God, and begin again.

¹³ Because of this very special potential for redemption and rehabilitation, young people must not be executed. As will be shown, "children are constantly maturing," Feld, "Juvenile Court Legislative Reform and the Serious Offender: Dismantling the 'Rehabilitative Ideal'," 15 Minn. L. Rev. 167, 231 (1981), and "where there is a glimmer of hope for repentance and rehabilitation, Christians [and society] should oppose capital punishment as a legalistic retribution," Sub-Committee of Public Affairs Committee of Ontario and Quebec; see also Volume II, Pastoral Letters of the United States Catholic Bishops, Statement on Capital Punishment, 427, 429 (1980) ("Punishment must be determined with a view ... to the reformation of the criminal and his reintegration into society....").

and growing concern for the care and nurture of children, and has enforced that concern through law. Systems of education, nutrition and housing, prohibitions against and limitations on child labor, prohibitions of and punishment for abuse and neglect of children, and so on, deal with and reflect the maturing commitment of American society to the care of children, not just for the children's sake but for the sake of the country. Children are protected because they grow up. Laws and institutions governing juvenile justice similarly reflect an evolving and maturing commitment to the goals of rehabilitation and reconciliation of children. Thompson, 108 S. Ct. 2687 (1988) (plurality opinion). The social concern for the welfare of children includes systematic legal restrictions on

the ability of young people fully to participate in society as adults. This system of enforced child dependence on adult society not only tolerates the less responsible acts of children, but also requires that adults take legal and moral responsibility for actions of young people until such time as the young can fully appreciate those actions. See, e.g., Parham v. J.R., 442 U.S. 584 (1979).

The experience and considered judgment of these Amici is that the execution of the young fundamentally abrogates society's chosen responsibility to restore and reconcile its children, and gratuitously bypasses a unique opportunity for rehabilitation. Executions of the young are opposed, for these and other reasons, by persons primarily charged with the care and

development of young people.¹⁴ Because youth are different, juvenile court judges,¹⁵ religious leaders, medical, psychological, and psychiatric experts,¹⁶

¹⁴ It further counsels against child executions when it is understood that, in addition to children's inherent immaturity and capacity for rehabilitation, homicidal adolescents, more so than other adolescents, "must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely unsupportive but violent and brutally abusive," Thompson, 108 S.Ct. at 2699 n.42, quoting Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States 11 (1987). Society's obligation is to all children, and juvenile crime represents "a failure of family, school, and the social system, which share responsibility for the development of American youth," Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

¹⁵ On July 14, 1988, the National Council of Juvenile and Family Court Judges adopted the following Resolution: "BE IT RESOLVED that the National Council of Juvenile and Family Court Judges is opposed to capital punishment for those who committed an offense while under the age of eighteen years."

¹⁶ See Brief of American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in

child welfare workers and advocates,¹⁷ professional educators, scholars and practitioners in juvenile criminal law, and increasingly, legislators believe that execution of the young is gratuitous and excessive punishment.¹⁸

The settled empirical and objective data and experience which has led to this widespread rejection of child executions point to at least two important differences between children and adults, either or both of which makes execution of the young unacceptable. First, an adolescent is not a little adult:

The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of

Support of Petitioner, in Thompson.

¹⁷ See Brief of Child Welfare League of America, et al., as Amici Curiae in Support of Petitioner in Thompson.

¹⁸ See n.29, infra.

its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them.

Jeremy Bentham, *Theory of Legislation* (Boston: Weeks, Jordan, 1840, Vol. I, p. 248); see also Thompson, 108 S. Ct. at 2693 n.23 (plurality opinion). "Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.'" Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982), quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979).¹⁹ This view is confirmed by a vast body of clinical

¹⁹ This first factor -- diminished culpability -- will not be further discussed here, but will become more important in Argument II, infra, to demonstrate that none of the traditional theories supporting the death penalty apply to persons with reduced culpability.

research and literature.²⁰

Second, even though adolescents are not little adults, they nevertheless have the resilient capacity to grow -- intellectually, emotionally, and spiritually -- into adults, notwithstanding setbacks along that route. The young must learn, and they do, but the learning often comes by making, and correcting, mistakes. The "possibility for reform and rehabilitation," Statement Issued by the United States Catholic Bishops, supra, p. 431, defines the standard of decency which guides our dealings with law-breakers. Unlike any other group of individuals, children grow up, and the reality of that maturation process warrants lesser punishment for

²⁰ See Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in Support of Petitioner, p. 4, in Thompson.

children than for adults.²¹

Certainly, the experience of these Amici is that children and adolescents are redeemable. In that way, they are truly special, and countless testimonials could be provided to demonstrate to the Court that religious organizations and institutions are successful at working with troubled adolescents and in helping them return to the path of proper citizenship.²² The experience of other

²¹ For this reason, even when a decision has been made to try a juvenile in adult court, full adult penalties are not necessarily appropriate. Trial of a juvenile in adult court, whether by legislative, judicial, or prosecutorial waiver, rarely involves a determination of the minor's maturity. Note, "The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles," 61 Ind. L.J. 757, 771 n.81 (1986).

²² Such testimonials are not necessary -- this Court has long recognized that the process through which children become adults is one that must involve these Amici, and parents, whose responsibility it is to prepare children for "additional obligations." Pierce v. Society of Sisters, 268 U.S. at 535. "The duty to prepare the child for 'additional obligations'... must be

amici, whose function it is to enter the maturation process when family/religion have not been enough, reinforces our belief from our experience that adolescents are specially redeemable and rehabilitatable.

First, as a matter of developmental psychology, children are redeemable. Adolescence, according to mental health experts, is a turbulent time. See Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in Support of Petitioner in Thompson. Adolescents are by nature capable of significant and spontaneous change. Id. at 7. Consequently, "incurrigibility is inconsistent with

read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." Wisconsin v. Yoder, 406 U.S. at 233.

youth ... it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." Workman v. Commonwealth, 429 S.W. 2d 374, 378 (Ky. 1968). Cognitive skills -- on which culpability must rest -- develop continuously. Greater tolerance respecting youthful offenders is justified by reason of their heightened capacity for behavior modification, according to mental health experts. Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae, supra, at 28. Adolescents are more responsive than adults to rehabilitative treatment, due to the fact that they are still going through the maturation process. Id.

Second, the practical experience of

workers with juveniles teaches that children are rehabilitated. Social workers, youth counselors, juvenile court caseworkers, and others all intimately familiar with youthful offenders agree -- redemption works with children and adolescents. Social scientific literature is replete with evidence that even the most violent adolescents are capable of dramatic change and rehabilitation. For example, a two-year follow-up study of homicide offenders paroled from the California Youth Authority (CYA) in 1984 showed that 76.7% of these offenders successfully completed their period of parole, while CYA parolees who had been convicted of non-homicide offenses had a parole success rate of only 41.9%. California Youth Authority, Offender-Based Institutional Tracking System (1987). A

study of chronic and violent juvenile offenders in Ohio similarly found that approximately 60% of youths who were charged with murder in juvenile court were not subsequently even re-arrested as adults. D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, The Violent Few (1977).²³ Observers and caseworkers have repeatedly found that adolescents can be taught to conform to society's norms, precisely because juvenile crimes grow out of the "[a]dolescent's ... vulnerab[ility], ... impulsivi[ty], and ... lack of self-discipline[]." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978), (quoted

²³ Research has long shown that as people get older, their propensity to commit crime decreases, so that by the time they reach their early twenties, they commit fewer offenses. Note, "The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles," 61 Ind. L.J. 757, 786 n.174 (1986).

in Eddings v. Oklahoma, 455 U.S. at 115 n.11).

Thus, it is our experience and the experience of other professionals with whom we often work, and from whom we learn, that children are different in a way that requires a legal distinction. Children by their nature are not hopeless, incorrigible, and unredeemable. They are the very embodiment of our hope for humankind because of their proven ability to be and do better, to contribute and to succeed, and to amaze and encourage us with the power of the human spirit. Such potential should not be extinguished, and these Amici believe that the "'evolving standards of decency' of our society," Thompson, 108 S. Ct. at 2719 (dissenting opinion), require that children be recognized as different for death penalty purposes.

II. THE EXECUTION OF AN INDIVIDUAL WHO WAS UNDER EIGHTEEN YEARS OF AGE AT THE TIME OF THE OFFENSE IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Some four-year-olds have the maturity of a two-year-old, some have the maturity of a six-year-old. Some eighteen-year-olds have the maturity of a fifteen-year-old, some fifteen-year-olds have the maturity of an eighteen-year-old. Legal adulthood in this country is a function not of maturity but of age. Thus the immature eighteen-year-old may fight a war and vote, while the mature fifteen-year-old is exempted from such duties and pines for such privileges.

This line-drawing is arbitrary in the same sense that all societal decisions are arbitrary, based as they are on decades and centuries of tradition, and interwoven as they must be with inarticulable premises and seemingly

a priori conclusions. Despite this characteristic, line-drawing reflects, or creates, this society's standard of decency in some areas, and the line is drawn at a point which most can agree is "right." There is no "logic" which proves that no person is mature enough until age 18 (or 21) to drink alcohol, and no "logic" which proves that no one under 16 has the maturity to drive an automobile. But these are rules our society imposes on our children, and these are the rules under which they are forced or allowed to operate, notwithstanding their varying degrees of intellectual, social, religious, moral, and political development.

And so it is when the Court decides to draw a line on the death penalty. Thompson, 108 S. Ct. at 2706 ("The plurality and the dissent agree on two

fundamental propositions: that there is some age below which a juvenile criminal can never be constitutionally punished by death, and that our precedents require us to locate this age....") (O'Connor, J., concurring). The line selected will have its arbitrary aspects.²⁴ Its point, however, will be determined by what this society intuitively knows, as reflected in other drawn lines, and it will be drawn according to what is the accepted standard of decency in this society. While these Amici believe that execution is wrong for anyone, it is especially wrong for adolescents, and if this Court is to choose an age below which

²⁴ Legal classifications of children as children almost never allow a child to assume the rights and privileges of adulthood prematurely -- even upon a showing of exceptional maturity. Where they do so allow, ironically, a history of violent juvenile criminal behavior would ipso facto preclude a finding of exceptional maturity, and would bar the child's assumption of adult status.

executions will be barred, society has already paved the way. Age 18 is the most clearly defined, the most heavily relied upon and assumption-filled age line in this country, and perhaps in the world. Eighteen is not only the line for adulthood, but it is also the line increasingly chosen by legislators for the allowance of executions. The experience of these Amici is that in other spheres and for other purposes, age 18 -- while somewhat arbitrary -- by and large works, and that it indeed reflects society's notion of what is properly understood as the time for passage into adulthood. For Eighth Amendment purposes, as for so many other purposes, age 18 works, and the execution of one who was under 18 at the time of the offense is cruel and unusual punishment.

A. Executing Minors Is The Gratuitous Imposition Of Suffering, And Offends The Standards Of Decency Expected In An Enlightened Society.

This Court has concluded that there are certain societal benefits from executions. Even if true, and even if those benefits are so weighty that they justify taking life -- adult life -- conclusions with which Amici strongly disagree, the purported justifications for execution ring especially hollow when applied to children. Children are different from adults. Nothing good accompanies executing them.

Minors have two distinct characteristics: immaturity and the ability to grow.²⁵ Unless it is to be "nothing more than the purposeless and needless imposition of pain and

²⁵ Minors who are on death row have significantly more characteristics in common: organic brain damage, neuropsychological damage, and a history of being abused. See n.14, supra.

suffering," Coker v. Georgia, 433 U.S. at 592, executions must serve some legitimate social purpose. "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, JJ.). Neither goal is furthered by execution of adolescents. ABA Juvenile Death Penalty Report 8-9 (Those justifications "lose much of their persuasiveness when applied to an adolescent's case.").

Retribution has as its benchmark "that punishment should be directly related to the personal culpability of the criminal defendant." California v. Brown, 479 U.S. 538, ___, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). Thus, persons who are insane at the time

of a crime go unpunished, persons with diminished capacity are convicted of crimes carrying less severe penalties, and unintentional criminal acts are less blameworthy and punished less than intentional acts. Even an adult who kills may not be executed if the killing was unintentional. Enmund v. Florida, 458 U.S. 782, 797 (1982). "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligation to its children," Thompson, 108 S. Ct. at 2699 (plurality opinion), retribution is incongruous in connection with imposition of the death penalty on children. Society can feel little revenge by executing a person who has minimal responsibility, because one with lower responsibility does not deserve the greatest punishment. For the same

reasons, deterrence is inapplicable. "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." Id. at 2700.

Punishment should not just do something bad for an offender, but should also do something good for society. No good comes from executing children. It is self-evident that execution is antithetical to society's stated goals for and commitment to youth -- rehabilitation. The difference between an adult and a child is "responsibility." Children are not treated as being fully responsible. Society assumes responsibility for children. It adds the ultimate insult to injury for society to fail in its responsibility to a child,

and then to hold the child responsible for the failure by executing him or her. Society's mistakes should be corrected, not eradicated, and with adolescents, more than with any others, correction has the highest potential.

B. Objective Indicia Support Age 18 As The Age For Adult Responsibility.

The cruel and unusual punishment clause of the Eighth Amendment prohibits punishments that violate "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. at 101, as those standards are objectified by such indicia as legislation and actual jury verdicts, and as they have been expressed by respected professional organizations. Thompson, 108 S. Ct. at 2691-92 (plurality opinion). All three of these sources have agreed with these Amici, have recognized the "societal standard of

decency" that execution of adolescents is cruel and unusual punishment, and have decided that age 18 is, or ought to be, controlling.

For example, there is no death penalty in juvenile court. This legislative reality speaks volumes. Even louder, however, is the proclamation from juvenile court judges, the very persons with the most direct contact with persons under 18 years of age who commit criminal offenses, and with the most experience in how juveniles can and should be sentenced. Juvenile court judges publicly and formally oppose executions of persons under 18 at the time of the offense.²⁶ Others in the legal community concur. The American Bar Association, the American Law Institute's Model Penal Code, and the National Commission on

²⁶ See n.15, supra.

Reform of Federal Criminal Laws all take the position that eighteen years is the minimum age for execution eligibility.²⁷ In addition, in Thompson, no fewer than twenty-five professional organizations filed or joined in amici briefs opposing juvenile executions, with age eighteen being the only cut-off mark suggested.

Legislators uniformly choose age 18 as the point at which major disabilities are shed and massive responsibilities are assumed. Such legislative fiat is widely accepted. New Jersey v. T.L.O., 469 U.S. 325 (1985) (Powell, J., concurring); New York v. Ferber, 458 U.S. 747 (1982). In most states and for most purposes, a "minor" means one below 18, and a minor

²⁷ See American Bar Association Report 410, 117A, approved August 1983; American Law Institute, Model Penal Code §210.6(1)(d) (Proposed Official Draft 1962); and National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code §3603 (1971).

has severely restricted rights and privileges. A person who is one day shy of 18 cannot vote or contract; nor can they, without permission, marry, get a driver's license, or stay out late.²⁸ In addition, age 18 is the chosen maximum age for juvenile court jurisdiction in thirty-seven states and the District of Columbia. See National Institute for Juvenile Justice and Delinquency, Major Issues in Juvenile Justice Information and Training, Youths in Adult Courts: Beyond Two Worlds 44, 86 n.2 (1982). Legislation specifically on the death penalty also chooses eighteen.²⁹

²⁸ Other disabilities of those below the age of 18 are described in the brief of the National Legal Aid and Defender Association, et al., in Thompson.

²⁹ The recently enacted federal death penalty legislation -- and its predecessor bills -- provides that a sentence of death may not be imposed upon a person who was less than 18 years old at the time of the offense. 134 Cong. Rec. S7579-S7580 (June 10, 1988). Fourteen states and

Finally, this Court looks to the actions of jurors as an indication of standards of decency. The actions of jurors also

the District of Columbia have rejected capital punishment completely. Of the 36 states retaining the death penalty, 19 set no minimum age. Thompson, 108 S.Ct. at 2694-95.

It can hardly be said that the states with no minimum age have consciously sanctioned execution of one under 18, for there is no evidence that these states "realize[d] that [their] ... actions would have the effect of rendering (minors under the age of 18) death-eligible or ... [gave] the question the serious consideration what would have been reflected in the explicit choice of some minimum age for death-eligibility." Thompson, 108 S. Ct. at 2711 (O'Connor, J., concurring).

Eighteen states expressly exclude youths under age 16, 17, or 18 in their death penalty statutes. Of these eighteen states, twelve states establish a minimum age of 18. The trend is 18. Seven of the 12 states with an age 18 minimum selected that age limit within the past seven years. Ohio in 1981 set 18 as its minimum age for execution; Nebraska did so in 1982; Tennessee did so in 1984; Colorado and Oregon did so in 1985; New Jersey did so in 1986. See Ohio Rev. Code Ann. §2929.02(A) (Page 1984); Tenn. Code Ann. §§37-1-102(3), 4:37-1-103, and 37-1-134(a)(1) (Repl. 1984); Neb. Rev. Stat. §28-105.01 (1985); Colo. Rev. Stat. §16-11-103 (1986); Or. Rev. Stat. §161-620 (1985); N.J. Stat. Ann. §2C:11-3f (West 1986) (L. 1985, ch. 478, §1, approved Jan. 17, 1986).

reflect a repugnance to the execution of juveniles.³⁰

C. Age 18 Is Inextricably Interwoven in the Fabric of Morality Entertained by This Society.

A society's moral judgment is as solidly reflected by its religious experience as by the opinions of "professionals," or the actions of legislatures or jurors. These Amici daily gauge "the evolving standards ... entertained by the society," Thompson, 108 S.Ct at 2719 (Scalia, J., dissenting,) and those standards soundly reject executing adolescents. The objective fact is that society recoils at the thought of executing a person who committed a crime as a minor, and the

³⁰ In 1983, 38 of the persons on death row were under 18 at the time of their crime. In 1986, the number had dropped to 32, but the adult death row population had increased by 500. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. L. Rev. 363, 384 (1987).

inescapable societal consensus is that a minor is a person under 18 years of age. If the jurisprudence of the death penalty truly turns on the conscience of our citizens, this Court must draw the line for execution at age 18, as it has been drawn throughout the stratum of decisions concerning youth.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

MARK EVAN OLIVE
1010 San Luis Road
Tallahassee, FL 32304
(904) 575-9073

MARY CHARLOTTE McCALL
1210 San Luis Road
Tallahassee, FL 32304
(904) 575-5070

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JOSE MARTINEZ HIGH,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writs of Certiorari to the United States Court of Appeals
for the Eleventh Circuit and the Supreme Court of the State of Missouri

**BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA,
NATIONAL PARENTS AND TEACHERS ASSOCIATION,
NATIONAL COUNCIL ON CRIME AND DELINQUENCY,
CHILDREN'S DEFENSE FUND, NATIONAL ASSOCIATION
OF SOCIAL WORKERS, NATIONAL BLACK CHILD
DEVELOPMENT INSTITUTE, NATIONAL NETWORK OF
RUNAWAY AND YOUTH SERVICES, NATIONAL YOUTH
ADVOCATE PROGRAM, AND AMERICAN YOUTH WORK
CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

RANDY HERTZ*

MARTIN GUGGENHEIM

Attorneys for Amici Curiae

New York University School of Law

715 Broadway — 4th Floor

New York, New York 10003

(212) 998-6430

** Counsel of Record*

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INTERESTS OF AMICI CURIAE¹

The Amici who have joined in submitting this brief are linked by their special concern for children and their extensive experience in working with troubled youth. It is the hope of Amici that their insights into the unique nature of childhood and the attributes of children will be of assistance to the Court in resolving the difficult issues raised in these cases.

The Child Welfare League of America is an association of approximately 450 leading child welfare agencies in the United States and Canada and 1,200 affiliates in twenty-seven state associations, devoted to improving services for deprived, neglected, and abused children. The Child Welfare League

1/ This brief is being filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the Court.

includes in its membership both public and voluntary, as well as both religious and non-sectarian agencies.

The National Parents and Teachers Association (PTA) is the nation's largest child advocacy organization, comprising 6.4 million members in 50 state congresses and 26,000 local units nationwide and in Europe. A 501(c)(3) non-profit corporation, PTA is devoted to the education, health, protection, and welfare of children and youth. The national PTA pursues child-related federal legislation, prepares educational materials, and promotes parental involvement in the lives of children.

The National Council on Crime and Delinquency is a non-profit corporation that conducts research, recommends national juvenile justice standards, and works with correctional and juvenile court profession-

als and citizens' groups to improve the quality of the criminal and juvenile justice systems.

The Children's Defense Fund (CDF) is a national public charity that represents and advocates on behalf of low-income, minority and handicapped children. CDF strives for preventive intervention before youth drop out of school, suffer family break-down or get into trouble. CDF also addresses the special needs of troubled youth in the child welfare, juvenile justice, and mental health systems.

The National Association of Social Workers (NASW), a non-profit professional association with over 115,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice and to improving the

quality of life through utilization of social work knowledge and skills.

The National Black Child Development Institute (NBCDI) is a non-profit organization dedicated to improving the quality of life for Black children and youth. NBCDI's network of affiliates provides services such as finding adoptive homes for Black children and providing tutoring and leadership training for youth, and its volunteers help educate their communities about national, state, and local issues facing Black youth.

The National Network of Runaway and Youth Services, Inc. is a membership organization of approximately 1000 community-based youth-serving agencies, which serves as a communication, information and public education exchange on issues affecting youth, advocates on behalf of vulnerable youth and their families, and

conducts research and demonstration projects.

The National Youth Advocate Program, Inc., is a private non-profit youth advocacy and direct-service organization, which is responsible for developing and providing a range of individualized, flexible and innovative community-based programs for very troubled and needy youth as an alternative to institutionalization, and which has had considerable success in working with older adolescents with very serious needs and behavior problems.

The American Youth Work Center, a Washington-based organization that promotes improvement of services to children at risk, holds national and international training conferences and prepares reports on issues relating to youth services.

SUMMARY OF ARGUMENT

Amici's lengthy experience in counseling and rehabilitating troubled youth compels the conclusion that no person should ever be executed for an offense committed while under the age of eighteen years.

In Part I of this brief, amici demonstrate the unavailability of the conclusion that the Eighth Amendment establishes safeguards against the execution of children who were under eighteen at the time of the offense. Amici draw on their knowledge of adolescents to show that the same factors that render capital punishment unconstitutional for very young children render it equally improper for all children below the age of eighteen. In particular, amici call on their knowledge of youthful offenders to show that even extremely violent youth are capable of rehabilitation

when provided with appropriate services. It would not only be senseless, but fundamentally inhumane, to extinguish the lives of young people who could grow into productive and responsible members of society.

Part II demonstrates that even assuming arguendo that viable distinctions could be drawn between sub-classes of children for purposes of capital punishment, the statutory schemes of Georgia and Missouri fail to serve that classification function in a constitutionally acceptable manner.

ARGUMENT

I.

The Eighth Amendment Self-Evidently Prohibits the Execution of Children, and There Is No Constitutionally Acceptable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

- A. Examination of the Reasons Why Execution of Very Young Children is Self-Evidently Unconstitutional Reveals the Factors that this Court Should Consider in Determining the Minimum Age for Eligibility for Capital Punishment

Last Term, all the members of this Court "agree[d] on [the] . . . fundamental proposition . . . that there is some age below which a juvenile's crimes can never be constitutionally punished by death." Thompson v. Oklahoma, 108 S. Ct. 2687, 2706 (1988) (O'Connor, J., concurring). See id. at 2695 (plurality opinion); id. at 2718 (Scalia, J., dissenting).

The hypothetical employed by the plurality in Thompson in describing this proposition as "self-evident" -- the execution of a ten-year-old (see id. at 2695 & n.27) -- is worth considering in order to extract the factors that render it compelling. As this hypothetical makes apparent, the execution of a child does not contribute measurably to either of the "two principal social purposes" of capital punishment: "deterrence of capital crimes by prospective

offenders" and "retribution." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

This Court concluded in Gregg, supra, that "the death penalty undoubtedly is a significant deterrent" for many criminals. 428 U.S. at 185-86. In speaking of the quintessential type of murderer who might be deterred by capital punishment -- the "murder[er] for hire" who engages in a "cold calculus . . . preced[ing] the decision to act," id. at 186, the Court presumably was envisioning a sophisticated adult. With respect to adult murderers, it seems quite clear that the expansion of the range of the death-eligible population to include ten-year-olds would not contribute even marginally to the goal of deterring adults from committing capital crimes. Adults are not likely to view the execution of a ten-year-

old as having any relevance to them.

Thus, the only population that could even conceivably be affected by the inclusion of ten-year-olds in the death-eligible population would be children in the same general age range. But, in fact, the execution of a ten-year-old would not deter other young children from homicide, for such children do not have the ability to make rational judgments about their behavior. Ruled by their feelings, extraordinarily dependent upon their parents for protection and guidance and survival, and emotionally bound to their families, young children's "judgments" are the products of family dynamics and emotion, rather than the considered assessment of alternative courses of behavior. Thus, a ten-year-old might kill someone (or at least attempt it) if the homicide seemed necessary to the aid and

comfort of his family or if it seemed that the family would condone or approve it. The threat of death would no more deter such a child than it would "those [adults] who act in passion for whom the threat of death has little or no deterrent effect." Gregg v. Georgia, supra, 428 U.S. at 185.

Similarly, the execution of a ten-year-old would not satisfy society's need for retribution. Ten-year-olds do not yet have the capacity to function as moral beings, able to evaluate their behavior in light of socially accepted values. They simply do not yet know the appropriateness of behavior within the society in which they live. Instead, ten-year-olds are profoundly dependent upon their parents and their family to define for them the boundaries of the appropriate. Ten-year-olds have no independent ability to evaluate the appro-

priateness of their own behavior and thus cannot be held personally responsible for that behavior, even if it transgresses the criminal law. For that reason, condemnation of ten-year-olds makes no contribution to society's need for retribution.

As this Court has stated, "retribution as a justification for [the death penalty] . . . very much depends upon the degree of [the defendant's] culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). The "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison v. Arizona, 107 S. Ct. 1676, 1687 (1987). The ultimate sanction of death is reserved for those who engage in acts of "intentional wrongdoing" (Enmund, supra, at 800) and "purposeful . . . criminal conduct" (Tison,

supra, at 1687): those individuals who intentionally kill or who "knowingly engag[e] in criminal activities known to carry a grave risk of death." Id. at 1688. But ten-year-olds lack the ability to understand the moral implications of their behavior, and thus cannot form the "highly culpable mental state[s]" (id.) that warrant the retributive imposition of the death penalty.

Finally, the execution of a ten-year-old is not warranted by the penological justification of incapacitation. The need for incapacitation arises only if the likelihood that an offender will kill again is so great that imprisonment will not suffice to protect other people. See generally Gregg v. Georgia, 428 U.S. at 183 n.28. It is unthinkable that such a need could exist with respect to a ten-year-old. Such a child is hardly more than a hint of what he

or she will become as an adult. The potential to grow into a morally responsible, productive adult is unlimited in such a child. With positive support and education, a ten-year-old child can as fully leave behind the emotions and behaviors that led that child to kill as the butterfly leaves behind the cocoon. There simply cannot be a legitimate need to incapacitate a ten-year-old child with the finality of death. As observed by the Supreme Court of Kentucky with respect to a child older than ten:

[I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. Commonwealth, 429 S.W.2d 374, 378

(Ky. 1968).

B. The Attributes of Childhood that Render Ten-Year-Olds Exempt from Execution Are Generally Shared by the Class of Minors Below the Age of Eighteen

In resolving the difficult question of where the Eighth Amendment draws the line between the class of clearly exempt young children and those individuals eligible for capital punishment, the foregoing analysis of the characteristics of a ten-year-old provides guidance. The line must be drawn in such a way as to reliably guard against execution of children whose impulsivity and lack of judgment render inapplicable the goals of deterrence and retribution, and whose capacity for growth renders inapplicable the goal of permanent incapacitation.

1. The Prevalence of Impulsivity and Poor Judgment Among Adolescents Below the Age of Eighteen Renders Inapplicable the Goals of Deterrence and Retribution

As the Thompson plurality noted, social scientific literature overwhelmingly supports the conclusion that adolescence is a period characterized by impulsivity and poor

judgment. Thompson, supra, 108 S. Ct. at 2699 n.43 (plurality opinion). The experience of Amici in working with adolescents amply supports these observations about the period of adolescence. The stage of developmental growth known as adolescence frequently is characterized by: impulsivity and inability to exercise self-restraint; inability to consider the future consequences of one's actions; the false confidence generated by feelings of omnipotence; inadequate judgment, in part because of the lack of sufficient life experience to provide a perspective or broader context for evaluating events; and susceptibility to the influence of peers, partly because of the lack of sufficient confidence in one's own identity.

This Court has repeatedly recognized these aspects of adolescence. For example, in Eddings v. Oklahoma, 455 U.S. 104 (1982),

the Court observed that minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage" and that adolescents "generally are less mature and responsible than adults." Id. at 115-16. Similarly, in Haley v. Ohio, 332 U.S. 596, 599 (1948), this Court referred to the "period of great instability which the crisis of adolescence produces."

The typical attributes of adolescence have an obvious bearing on the assessment of whether executions of juveniles could possibly serve the penological goals of capital punishment. Because many adolescents act impulsively without a "cold calculus . . . preced[ing] the decision to act," Gregg v. Georgia, supra, 428 U.S. at 186, they are no more subject to deterrence than are their ten-year-old counterparts. The

retribution rationale is equally inapplicable: adolescents "'deserve less punishment because [they] may have less capacity to control their conduct and to think in long-range terms than adults.'" Eddings v. Oklahoma, supra, 455 U.S. at 116 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders). The retribution rationale also is less applicable to juveniles because "'youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" Id.

2. Adolescents' Vast Capacity for Growth and Rehabilitation Renders Unjustifiable the Use of the Ultimate and Irrevocable Penalty of Death

As this Court recognized in Jurek v.

Texas, 428 U.S. 262 (1976), and again in Skipper v. South Carolina, 476 U.S. 1 (1986), the determination of the suitability of the use of the ultimate penalty of death inevitably involves a "'predict[ion] . . . [of the] convicted person's probable future conduct.'" Skipper, supra, 476 U.S. at 5; Jurek, supra, 428 U.S. at 275. Accordingly, just as Jurek approved the use of evidence that "a defendant would in the future pose a danger to the community if he were not executed . . . as . . . an 'aggravating factor' . . . [,] [Skipper held that] evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skipper, supra, 476 U.S. at 5. See also Franklin v. Lynaugh, 108 S. Ct. 2320, 2329 (1988) (describing Skipper as holding that the "defendant's likely future behavior" is a

relevant consideration in a capital sentencing determination).

While adults may have widely varying degrees of potential for rehabilitation, the class of adolescents shares a common trait of vast potential for rehabilitation. As the Thompson plurality observed, adolescence is a period marked by "capacity for growth." 108 S. Ct. at 2699. It has been the experience of amici, in working with adolescents, that they have boundless capability for change, since the personality that the individual will have as an adult is still in the process of being formed. And, precisely because adolescents are so malleable and may develop very different personalities and values as they gain experience and perspective, it is impossible to conclude definitively that a particular youth must be executed in order to incapacitate him or her

from committing future crimes. Indeed, as the following discussion will show, the social scientific literature and the experience of amici demonstrate that many violent adolescents can be rehabilitated.

Social scientific literature is replete with evidence that even the most violent adolescents are capable of dramatic change and rehabilitation. A two-year follow-up study of homicide offenders paroled from the California Youth Authority (CYA) in 1984 showed that 76.7 % of these offenders successfully completed their period of parole, while CYA parolees who had been convicted of non-homicide offenses had a parole success rate of only 41.9 %. California Youth Authority, Offender-Based Institutional Tracking System (1987). A study of chronic and violent juvenile offenders in Ohio similarly found that

approximately 60 % of youths who were charged with murder in juvenile court were not subsequently re-arrested as adults. D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, The Violent Few (1977).

The experience of Amici in working with young people confirms these social science findings on the malleability and inherent rehabilitative potential of violent youth. The populations served by amici range from extremely young, neglected children to violent delinquents on the verge of adulthood. Amici have repeatedly found that these children can be taught to adopt society's norms, precisely because juvenile crimes grow out of the "[a]dolescent[']s ... vulnerab[ility], ... impulsivi[ty], and ... [lack of] self-discipline[]." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth

Crime 7 (1978) (quoted in Eddings v. Oklahoma, supra, 455 U.S. at 115 n.11).

An examination of a few actual case histories provides the clearest possible illustration of the rehabilitative potential that even extremely violent youth possess:

(i) A girl whom we will call Dora (real name withheld to preserve confidentiality), grew up in Washington D.C., raised by parents who were drug sellers and addicts. Starting when Dora was eight years old, her parents used her as a courier in their drug trade. When Dora was fourteen-years-old, she killed her boyfriend, by shooting him in the back. When Dora was seventeen, she committed an armed robbery, in which she pistol-whipped the victim. At the age of eighteen, Dora committed another homicide, again of a boyfriend. Dora was removed from her community, and sent to a residential facility in California. She graduated successfully from the program and has remained crime-free for the past seven years. Today she is twenty-seven years old, still living in California, living with a man who is gainfully employed as the manager of a small store, and raising two children.

(ii) Kevin, a sixteen-year-old who resided in the Roxbury section of Boston, committed a series of robberies while armed with a knife. During one of these

armed robberies in 1974, he gratuitously stabbed a senior citizen. Kevin was convicted in juvenile court of armed robbery and assault and battery by means of a dangerous weapon, and then, pursuant to the procedure that prevailed in Massachusetts at the time, the Commonwealth attempted to transfer him to adult court for re-prosecution as an adult. The transfer was prevented by this Court's intervening decision in Breed v. Jones, 421 U.S. 519 (1975). Kevin was sent to a community-based non-residential treatment program for juveniles. The program provided intensive special educational services appropriate for his mild mental retardation, and provided counseling to deal with his low self-esteem, inadequate home life, and negative peer group. Kevin successfully graduated from the program after one year. Since that time, he has remained crime-free.

(iii) Michael, a fifteen-year-old boy who lived in Washington, D.C., killed his step-mother with an axe, dismembered her body and put it in the dust-bin. He was convicted in juvenile court in 1964, and sentenced to the juvenile detention facility for an indeterminate period. He remained in the facility for 4 years and was released when he was nineteen years old. While he had been incarcerated in the facility, he received a variety of rehabilitative services and, most significantly, established a relationship of trust with a recreation counselor, with whom he maintained contact even after leaving the facility. Upon returning to the community, Michael finished school and

then obtained employment in an air-conditioning installation company. He subsequently married, settled in a working class apartment project, and raised a child. As of his last contact with the recreation counselor, which occurred in 1980, he had remained crime-free and was still employed and happily married.

(iv) Edward Harrison (real name being used with consent) was seventeen years old when he committed a felony murder, shooting the victim with a sawed-off shotgun during the commission of a robbery. The crime took place in Washington D.C. in March of 1960. Eddie was charged as an adult with first-degree murder, convicted, and sentenced to death. While Eddie was on death row awaiting execution, having waived his right to appeal, it was discovered that his trial attorney had been practicing law without a license. Accordingly, Eddie's conviction was reversed and he was re-tried. He was once again convicted, but because the death penalty was no longer in effect, Eddie was sentenced to life imprisonment. The conviction was again overturned on appeal, Eddie was again re-tried and again sentenced to life imprisonment. However, during the eight-and-a-half years that Eddie had spent in prison pending appeals and re-trials, he had become involved in arranging rehabilitative programs for himself and other inmates. Through the support of prison staff and a local judge, Eddie was released pending appeal and became involved in designing rehabilitative programs for delinquent youth. His conviction was eventually upheld on

appeal, but, as a result of the progress he had achieved, his sentence was commuted by President Nixon. Since Mr. Harrison's release from prison in 1968, he has devoted his life to programs for youth. Now 45 years old, he is the executive director of a Baltimore-based program for pre-trial diversion for delinquent youth, which Mr. Harrison himself created and initiated with the aid of a federal grant, and which now is an established Maryland state program. Mr. Harrison also is the vice-chairman of the Maryland Juvenile Justice Advisory Council, and has testified before Congress on issues relating to youth and delinquency.

The same remarkable transformation that occurred in each of these cases has been replicated in numerous other cases of equally serious crimes as well as less serious crimes. The successes are usually due to the quality and creativity of the rehabilitative facility. For example, the House of Umoja in Philadelphia has experienced remarkable successes in reforming members of violent youth gangs, for more than a decade. See R. Woodson, A Summons to Life: Mediating Structures and the Preven-

tion of Youth Crime (1981); Fattah, "Call and Catalytic Response: The House of Umoja," in Violent Juvenile Offenders: An Anthology 231 (1984). The Glen Mills School in Concordville, Pennsylvania, has also had remarkable successes in reforming extremely violent delinquents, through a combination of excellent academic and vocational training and athletic programs, as well as a variety of creative measures designed to build self-esteem. For example:

Richard, a fifteen-year-old who was convicted of first-degree felony-murder in the West Virginia juvenile court, was placed in the Glen Mills School in March of 1984. During the period of almost three years that Richard remained at Glen Mills, he received special education classes and vocational training in a variety of marketable skills, and he participated in student government and varsity sports. During his final seven months at the school, Richard was placed in a day-time job in a local furniture store, where he could apply the wood-working skills he had learned at the school. Richard was released in January of 1987 and is now living with his sister in Ohio and complying with all of the

conditions of his probation. He is presently looking for employment in the furniture construction trade, and, in the interim, is working in a restaurant.

Developments in corrections policies in recent years provide the promise of continued and increased success in the reformation of violent youth. In January of 1980, the Federal Office of Juvenile Justice and Delinquency Intervention initiated a nationwide research and development effort to identify the most effective intervention strategies for rehabilitating violent juvenile offenders. See Fagan, Rudman & Hartstone, "Intervening with Violent Juvenile Offenders: A Community Reintegration Model," in Violent Juvenile Offenders: An Anthology, supra at 207-09. The preliminary results of this national research effort indicate that recidivism can be significantly reduced through a regimen of short-term confinement in a small secure facility

with intensive staff support, followed by the provision of carefully planned services upon the youth's re-entry into the community. See Krisberg, "Preventing and Controlling Violent Youth Crime: The State of the Art," in I. Schwartz, Violent Youth Crime: What Do We Know About It and What Can Be Done About It (1987). See also P. Greenwood & F. Zimring, One More Chance: The Pursuit of Promising Intervention Strategies for Chronic Juvenile Offenders (1985).

The available empirical evidence thus refutes popular assumptions about the "street-wise" or "hardened" nature of juvenile criminals. It suggests instead that adolescents, regardless of whether they committed very violent offenses or less serious crimes, are capable of rehabilitation. Thus, with respect to a crucial element of capital sentencing -- the

likelihood of commission of future crimes -- juveniles as a class are distinguishable from adults. Given the irrevocable nature of capital punishment which calls for a requirement of heightened reliability in capital sentencing, see, e.g., Lockett v. Ohio, 438 U.S. 586, 604-05 (1978), the Eighth Amendment cannot tolerate the risk of executing young persons who, with time, stand a great chance of maturing into productive members of society.

C. There Is No Constitutionally Acceptable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

Certainly it cannot be said that every person under the age of eighteen necessarily shares in precisely the same degree the qualities which typify the period of adolescence. Individual adolescents vary markedly in their degree of maturity, self-control, and judgment. The attainment of adult

levels of maturity and judgment may occur at different ages, depending upon the individual youth's prior experiences, education, and support network of parents and friends.

The question that must be resolved, then, is whether there is a principled basis for distinguishing among the class of adolescents in administering the death penalty.² As the discussion in preceding

2/ In essence, there are three distinct issues of criminal responsibility that may arise when a child is prosecuted for a crime. The first of these is whether the child is criminally responsible at all. As Justice Scalia noted in his dissenting opinion in Thompson, the common law absolved children under the age of seven from any criminal responsibility whatsoever. 108 S. Ct. at 2714. It is evident that the common law's concept of the minimal degree of maturity necessary to be prosecuted at all is a very different consideration from the question of the degree of maturity necessary to justify the ultimate punishment of death. The second question that must be asked regarding prosecution of a child is

sections has demonstrated, children under the age of eighteen, as a class, share certain qualities that render the use of capital punishment unjustifiable. In the present section, amici will show that given the commonality of qualities such as impulsivity and poor judgment among adolescents, the only principled distinction between children and adults in the context of capital punishment is the age of majority. This conclusion is supported by the

whether that child, once subjected to criminal liability, should be prosecuted as an adult. The third and discrete question is whether that child, having been found mature enough to be transferred to adult court for prosecution as an adult, should be exposed to the ultimate punishment of death. A positive answer to that final question necessarily requires a greater level of culpability and thus maturity than that needed to render a child criminally responsible or even subject to transfer to adult court.

"objective manifestations" of society's views -- legislative pronouncements and jury verdicts -- and also by this Court's analysis of children's rights in prior caselaw.

1. The objective manifestations of modern values militate for drawing the line at age eighteen

There are only six States that have consciously and clearly chosen to sanction the use of the death penalty for defendants who were under the age of eighteen at the time of the offense. See Thompson, supra, 108 S. Ct. at 2696 n.30. Fifteen States and the District of Columbia prohibit capital punishment of adults and juveniles alike. Twelve States, although tolerating capital punishment for adults, have consciously chosen to set the minimum age of eligibility for capital punishment at eighteen. See id. Although twenty-three more jurisdictions

fail to specify a minimum age limit for capital punishment, it can hardly be said that these jurisdictions have consciously and clearly sanctioned executions of children under the age of eighteen since, as Justice O'Connor explained in her concurrence in Thompson, there is no evidence that these States "realize[d] that [their] . . . actions would have the effect of rendering [children below the age of eighteen] . . . death-eligible or . . . [gave] the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." 108 S. Ct. at 2711.

Even more significant to the assessment of the evolution of national standards of decency is the fact that recent state legislative proceedings demonstrate a clear trend of increasing recognition of the

unconscionability of executing children. Nebraska and Ohio established prohibitions against the execution of children under the age of eighteen in 1982. See Neb. Rev. Stat. § 28-105.01 (1985); Ohio Rev. Code Ann. § 2929.02(A) (1984). Colorado and Oregon followed suit in 1985, and New Jersey in 1986. See Colo. Rev. Stat. § 16-11-103(1)(a) (1986); Ore. Rev. Stat. §§ 161.620 & 419.476(1) (1987); N.J. Stat. Ann. §§ 2A:4A-22(a) (1987) & 2C:11-3g (Supp. 1988). In 1987, the Maryland legislature joined the growing trend by also adopting age eighteen as the minimum age for capital punishment. See Md. Code art. 27, § 412(f) (1988). Thus, it seems clear that the half-dozen States that have consciously sanctioned execution of children below the age of eighteen constitute a dwindling minority.

Model legislation and criminal justice

standards also reflect a contemporary judgment to ban executions of children below the age of eighteen. The Model Penal Code, which the Court considered in gauging the constitutionality of capital punishment in Gregg v. Georgia, supra, 428 U.S. at 191, 193, recommends that children below the age of eighteen be deemed ineligible for capital punishment. See American Law Institute, Model Penal Code § 210.6 (Official Draft 1980). The National Commission on the Reform of Criminal Law similarly called for a prohibition against execution of children below the age of eighteen. National Commission on the Reform of Criminal Law, Final Report of the New Federal Code § 3603 (1971). The American Bar Association, which has never before taken a formal position on any aspect of capital punishment, adopted a resolution in 1983 opposing "the imposition

of capital punishment upon any person for any offense committed while under the age of eighteen." American Bar Association Report No. 117A (approved in August, 1983). The National Council of Juvenile and Family Court Judges similarly adopted a resolution on July 14, 1988, declaring that the Council "is opposed to capital punishment of those who committed an offense while under the age of eighteen years."

Accurate assessment of jury verdicts is complicated by the fact that prior to this Court's decision in 1982 in Eddings v. Oklahoma, supra, some states unconstitutionally prevented the sentencer in a capital proceeding from giving meaningful consideration to the youth of the defendant as a mitigating factor. Nonetheless, jury verdicts in the present decade show an overwhelming trend against capital punish-

ment when the defendant was a minor. As of December, 1983, children under age eighteen constituted only 2.9 % of the death row population of 1,289 persons. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 384 (1986). Significantly, in the wake of Eddings, as the number of death sentences imposed upon adults has multiplied, the rate of death sentences for minors has decreased. From December 1983 to July 1986, the adult population of death row increased by 42 % (from 1,250 to 1,770), while the juvenile population decreased by 16 % (from thirty-eight to thirty-two); juveniles accounted for only 1 % of the approximately 700 death sentences imposed from December, 1983, to March, 1986. Id.

The consensus of modern values is also evident in the "'climate of international

opinion.'" Enmund v. Florida, supra, 458 U.S. 796 n.22. Three major international human rights treaties expressly prohibit the death penalty for children below the age of eighteen. See International Covenant on Civil and Political Rights, Article 6(5), in Multilateral Treaties Deposited With the Secretary General of the United Nations, at 124, U.N. Doc. ST/LEG/Ser. E/3 (1985); American Convention on Human Rights, Article 4(5), in Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II, 65, Doc. 6, July 1, 1985, at 63; Geneva Convention for the Protection of Civilians in Time of War, Article 68. Over eighty nations, including the vast majority of western European countries, have either abolished the death penalty altogether or have forbidden it for children and adolescents.

Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 Cin. L. Rev. 655, 666 n.44 (1983). Even among the eighty-one nations that do permit executions of children, there were only two juveniles who were actually put to death during the decade from 1973-82. Id. at 666-67 n.44. Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under eighteen years of age." See United Nations Economic and Social Council (UNESCO), Report of the Secretary General on Capital Punishment at 10, UN. Doc. E/5242 (1973).

2. This Court's prior analyses of children's rights and disabilities also militate for treating children as a coherent class and drawing the line at age eighteen

This Court's decisions concerning the

legal rights and disabilities of minors repeatedly treat juveniles as a coherent class, without distinguishing between mature and immature minors. Significantly, in these cases, the Court did more than simply defer to legislative line-drawing. The Court in each case examined the justifications for drawing a line between childhood and adulthood, and upheld legislative actions because the Court itself concluded that minors' reduced capacity for mature decisionmaking provided a justification for treating them differently from adults.

In rejecting a challenge to the constitutionality of a statute authorizing preventive detention for juveniles, this Court in Schall v. Martin, 467 U.S. 253 (1984), employed a due process analysis that was based upon the Court's perception of the differences between childhood and adulthood.

The Court ruled that the right to liberty enjoyed by all adults is "qualified" (id. at 265) when applied to a juvenile, because "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves." Id. Without distinguishing between mature and immature minors, or between differing age groups of minors, the Court broadly concluded that juveniles' immaturity and lack of judgment justify the State in employing preventive detention to protect "'the juvenile from his own folly.'" Id. at 265; see also id. at 266.

The Court similarly applied a class-wide assumption of immaturity in Parham v. J.R., 442 U.S. 584 (1979), to reject a due process challenge to a Georgia civil commitment statute that authorized third-party commitment of children under the age of eighteen. In curtailing children's liberty

interests in this context, the Court relied upon the generalization that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." Id. at 603.

When the Court in Ginsberg v. New York, 390 U.S. 629 (1968), rejected a First Amendment challenge to a state statute prohibiting the sale of sexually explicit (albeit non-pornographic) material to minors, the Court's analysis rested upon its conclusion that the State can take steps to ensure that children "are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" Id. at 640-41. In a passage that has often been reiterated by this Court, Justice Stewart expressed the generalization that children are "not possessed of that full capacity for individual choice

which is the presupposition of First Amendment guarantees." Id. at 649-650 (Stewart, J., concurring) (footnotes omitted).

As the plurality observed in Thompson, "[i]t would be ironic if these assumptions that we so readily make about children as a class -- about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives -- were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment." 108 S. Ct. at 2693 n.23. There can be no justification for employing a "ratchet" analysis that forbids case-by-case decisionmaking for the sake of expanding juvenile rights while employing that very same form of decision-making for the sake of extinguishing the

greatest of all rights, the right to life.³

3/ The decisions addressing a young woman's privacy right to an abortion constitute the only factual context in which this Court has tolerated any line-drawing on the basis of the relative maturity or immaturity of individual youths. See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981). However, the Court has permitted line-drawing only in order to avoid irrevocable harm to mature minors. This Court struck down certain types of burdens on pregnant minors because of the "grave and indelible" consequences to a minor if she is forced to have a child. See Bellotti v. Baird, supra, 443 U.S. at 642 ("considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor"). Thus, the Court ruled that the Constitution requires States to recognize a distinction between mature and immature minors only where the deprivation of certain rights and privileges would result in "grave and indelible consequences." The present cases certainly do not fall within this exception which the Court has carved in its general approach of treating all minors as a coherent class. Unlike the

The only principled line between children and adults in the context of capital punishment is the same line that this Court has repeatedly drawn in defining the rights of minors: the age of majority. For this reason, the Court should rule that children who were below the age of eighteen⁴ at the

abortion cases, there are no "grave or indelible" consequences to anyone -- not the State and certainly not the minor -- in preventing minors from being executed.

- 4/ Although the States vary somewhat in the age designated as the "age of majority", virtually all States employ age eighteen. See M. Guggenheim & A. Sussman, The Rights of Young People 187, 290-91 (2d ed. 1985) (listing the age of majority for every state). This includes Georgia. See Ga. Code Ann. § 39-1-1(a) (1982). Missouri has not established a uniform age of majority; although eighteen is designated as the age of majority for most matters (see, e.g., Mo. Ann. Stat. § 431.055 (Supp. 1988) (competency to contract); Mo. Ann. Stat. § 475.010(11) (Supp. 1988) (trusts and estates); Mo. Ann. Stat. § 507.115 (Supp. 1988) (for purposes of

time of the offense cannot be executed.

II.

ASSUMING ARGUENDO THAT THERE WERE A PRINCIPLED BASIS FOR DISTINGUISHING AMONG JUVENILES IN THE CAPITAL SENTENCING CONTEXT, THE MECHANISMS FOR DOING SO IN GEORGIA AND MISSOURI DO NOT PROVIDE A CONSTITUTIONALLY ACCEPTABLE BASIS FOR SUCH DECISIONMAKING

The plurality and the dissent in Thompson agreed that the key considerations in determining the suitability of execution for a young person are maturity and responsibility. As the following discussion will show, neither Georgia nor Missouri requires a determination of maturity or moral responsibility as a prerequisite for sentencing to death an individual whose offense was committed prior to age eighteen

civil suits)), twenty-one is still the age of majority for some purposes (see, e.g., Mo. Ann. Stat. § 404.007(14) (Supp. 1988) (transfer of property to a minor)).

or even prior to age sixteen. Indeed, neither State even provides the minimal protection suggested by the dissent in Thompson: "a rebuttable presumption that [the defendant] . . . is not mature and responsible enough to be punished as an adult." 108 S. Ct. at 2712.

A. Although the Georgia Statute Sets a Minimum Age for Death-Eligibility, It Fails to Provide Adequate Procedural Safeguards for Minors like Petitioner Jose High Who Are Above the Statutory Minimum Age

The Georgia statutory scheme, unlike the Oklahoma statute considered in Thompson, establishes a statutory minimum age, prohibiting capital punishment for a defendant who was under the age of seventeen at the time of the offense. See Ga. Code Ann. § 17-9-3 (1982).⁵ Under Georgia law, all

5/ Although the State of Georgia took the

seventeen-year-olds are eligible for capital punishment.

As Part I.B of this brief demonstrated, seventeen-year-olds share many of the qualities of adolescence that render capital punishment unjustifiable for younger children. The almost universal selection of age eighteen as the age of majority in this country attests to the widespread recognition that many seventeen-year-olds are unable to exercise adult judgment. That perception of the differences between

position for several years that the actual minimum age of eligibility for capital punishment was thirteen, see, e.g., Lewis v. State, 246 Ga. 101, 107, 268 S.E.2d 915, 920-21 (1980) (Hill, J., concurring); Hawes v. State, 240 Ga. 327, 337-41, 240 S.E.2d 833, 840-42 (1977) (concurring opinions of Hall, J., and Hill, J.), the Georgia Supreme Court made clear in Bankston v. State, 258 Ga. 188, 367 S.E.2d 36 (1988), that Ga. Code Ann. § 17-9-3 establishes an absolute minimum-age of seventeen.

seventeen- and eighteen-year-olds also is reflected in the selection of age eighteen as the minimum age of eligibility for capital punishment in most of the states that have consciously set a minimum age of death-eligibility. Even the Georgia legislature has recognized that significant developmental differences distinguish seventeen-year-olds from the class of adults whose adulthood begins on their eighteenth birthday: Ga. Code Ann. § 17-10-14 (Supp. 1987) provides that youths transferred to adult court and convicted of a crime (including a capital crime) can be imprisoned only in a juvenile facility and that placement in an adult correctional facility cannot take place until the youth reaches the age of eighteen.⁶

6/ This statute provides:
"Notwithstanding any other provisions

Yet, for defendants who are seventeen

of this article, in any case where a person under the age of 17 years is convicted of a felony and sentenced as an adult to life imprisonment or to a certain term of imprisonment, such person shall be committed to the Division of Youth Services of the Department of Human Resources to serve such sentence in a detention center of such division until such person is 18 years of age at which time such person shall be transferred to the Department of Corrections to serve the remainder of the sentence."

Ga. Code Ann. § 17-10-14 (Supp. 1987).

The conclusion that the Georgia legislature recognized the developmental distinction between the ages of seventeen and eighteen is not inconsistent with its enactment of a statute forbidding capital punishment for crimes committed before age seventeen. This minimum-age statute expresses the legislature's determination that no child under the age of seventeen can possibly be culpable enough to warrant imposition of the death penalty. It does not, however, preclude the conclusion that the developmental differences between ages seventeen and eighteen might result in some seventeen-year-olds being too immature to be eligible for the death penalty.

at the time of the offense, the only procedural protection afforded on account of the defendant's youth is the same procedural protection afforded young adults over the age of eighteen: consideration of the youth of the defendant as a mitigating factor. See, e.g., Lewis v. State, 246 Ga. 101, 104, 268 S.E.2d 915, 919 (1980). It is evident that such a system, which treats youth as simply one mitigating factor to be weighed against aggravating factors, does not provide for specific findings of the characteristics deemed important by every member of this Court in Thompson: maturity and culpability. That conclusion is demonstrated by Enmund v. Florida, 458 U.S. 782 (1982), where, notwithstanding Florida's providing for consideration of the defendant's minor participation in the crime as a statutory mitigating circumstance, see id. at 806

(O'Connor, J., dissenting), this Court created a rule requiring that "at some point in the process, the requisite factual finding as to the defendant's culpability . . . [be] made." Cabana v. Bullock, 474 U.S. 376, 387 (1986).

In failing to provide any procedural safeguards such as a specific determination of culpability despite their youth or "a rebuttable presumption that [they] . . . are not mature and responsible enough to be punished as an adult," Thompson, supra, 108 S. Ct. at 2712 (Scalia, J., dissenting), the Georgia system insufficiently guards against execution of defendants who were immature, non-culpable seventeen-year-olds at the time of the offense. Even if this Court does not establish a categorical minimum-age of eighteen, the Court should rule at the very least that a statutory scheme such as this

violates the Eighth Amendment.

B. Missouri's Use of Transfer to Determine Death-Eligibility Suffers from the Same Flaws as the Oklahoma Scheme Considered in Thompson and Results in Irrational and Inconsistent Imposition of the Death Penalty

1. The Missouri Statute Suffers from the Same Defects that Led this Court to Strike Down the Death Sentence in Thompson v. Oklahoma

The Missouri statutory scheme for determining juveniles' eligibility for the death penalty suffers from precisely the same flaws as the Oklahoma statute considered by this Court in Thompson. In Missouri, as in Oklahoma, the death penalty statute fails to establish any minimum age. See Mo. Ann. Stat. §§ 565.020 & 565.030-565.040 (Supp. 1988). For children under the age of seventeen (the age limit for the jurisdiction of the juvenile court, Mo. Ann. Stat. § 211.021 (Supp. 1988)), eligibility for capital punishment is determined by the

process of transfer to adult court.

Missouri law authorizes transfer of children "between the ages of fourteen and seventeen [who have] . . . committed an offense which would be considered a felony if committed by an adult." Mo. Stat. Ann. § 211.071(1) (Supp. 1988). Since the capital punishment statute specifies no minimum age, any child who is transferred to adult court for a capital offense is subject to the death penalty.

In Missouri, as in Oklahoma, there is no reason to believe that the state legislature "deliberately concluded that it would be appropriate to impose capital punishment" on the children subjected to transfer to adult court. Thompson, supra, 108 S. Ct. at 2707 (O'Connor, J., concurring). Because the legislature "proceeded in this manner, there is a considerable risk

that the . . . [Missouri] legislature either did not realize that its actions would have the effect of rendering [all transferred children] . . . death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." Id. at 2711 (O'Connor, J., concurring).

A review of Missouri caselaw on transfer to adult court amply supports the conclusion that "[t]here are many reasons, having nothing whatsoever to do with capital punishment, that might [have] motivate[d] . . . [the Missouri] legislature to provide as a general matter for some [16-year-olds] . . . to be channeled into the adult criminal process," such as a legislative judgment that "[t]he length or conditions of confinement available in the juvenile system . . .

[are] inappropriate for serious crimes or some recidivists." Id. at 2707 (O'Connor, J., concurring). See, e.g., State v. Tate, 637 S.W.2d 67, 71-72 (Mo. App. 1982) (fifteen-year-old one week short of his sixteenth birthday, charged with murder, transferred to adult court; in approving transfer, appellate court stresses that it was "reasonable for the juvenile court to conclude that from a practical standpoint only two years of rehabilitative confinement was available and that based upon the crime and defendant's past history such a period was not adequate to rehabilitate defendant and more important, to protect society from him"); State v. Owens, 582 S.W.2d 366, 371, 375 (Mo. App. 1979) (primary factor in justifying transfer of fifteen-year-old charged with rape was the restriction upon the length of confinement that could be

ordered through the juvenile justice system); State v. Kemper, 535 S.W.2d 241, 250-51 (Mo. App. 1976) (although fifteen-year-old charged with murder was a first offender who had been diagnosed as suffering from mental problems which could be treated in a secure wing of a State Hospital which included adults, transfer ordered because "there was no exclusively juvenile facility available to the court which would provide the treatment which might be required by the child and still afford the security which the court deemed essential in the handling of a youth such as appellant" and because the length of confinement through the juvenile justice system would not provide sufficient time for rehabilitation).

The only factor that prevents petitioner Heath Wilkins from benefitting from the rule this Court adopted in Thompson

is of course that petitioner is sixteen, and the facts of the Thompson case did not require this Court to consider the applicability of its holding to children over the age of fifteen. The evidence of a national consensus against execution of sixteen-year-olds is virtually as strong as the evidence considered by this Court in Thompson with respect to fifteen-year-olds, and certainly strong enough to justify the type of precaution adopted in Thompson. Fifteen of the eighteen states that have specified a minimum age for capital punishment prohibit execution of sixteen-year-olds.⁷ Thus, only three state legislatures in this country

7/ The only states that have established a minimum-age of sixteen are: Indiana (Ind. Code Ann. § 35-50-2-3 (Supp. 1987)); Kentucky (Ky. Rev. Stat. Ann. § 640.040(1) (1986)); and Nevada (Nev. Rev. Stat. § 176.025 (1987)).

have expressly and consciously chosen to classify persons who committed an offense while sixteen as eligible for the death penalty. Jury verdicts of death in cases in which the defendant was sixteen at the time of the crime appear to be almost as rare as verdicts of death for fifteen-year-olds.

See Streib, supra, at 384-86. Finally, the social scientific evidence shows that sixteen-year-olds share with fifteen-year-olds and younger children the qualities of impulsivity, lack of judgment, and potential for change that render inapplicable the societal purposes for the death penalty. See Part I supra.

Accordingly, even if the Court does not create a categorical minimum-age limit of eighteen, as amici have urged in Part I of this brief, the Court should, at the very least, strike down petitioner Heath Wilkins'

death sentence on the ground that it was imposed "under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution."

Thompson, supra, 108 S. Ct. at 2711

(O'Connor, J., concurring).

2. By Relying on Transfer as a Mechanism for Determining Eligibility for Capital Punishment, the Missouri Statute Results in "Freakish" and Unusual Application of the Death Penalty

There is a second and independent reason for finding that Missouri's statutory mechanism for determining eligibility for capital punishment violates the Eighth Amendment. The transfer system in Missouri is so unrelated to the necessary inquiry in capital punishment cases that its use as the determinant for death-eligibility results in freakish and unusual application of the death penalty.

The plurality, concurrence, and dissent in Thompson agreed that the critical consideration in determining juveniles' eligibility for capital punishment must be maturity. But Missouri transfer caselaw reveals that maturity is not the central determinant of which children are transferred to adult court and rendered eligible for capital punishment. See, e.g., State v. Mouser, 714 S.W.2d 851, 858 (Mo. App. 1986) (sixteen-year-old charged with capital murder transferred despite evidence of "immaturity and tendency to make decisions emotionally rather than intellectually" and despite lack of criminal history, because defendant was intellectually average and because the rehabilitative facilities available through the juvenile court were not "sufficiently secure and available").

As demonstrated in the previous

section, transfer in Missouri is frequently predicated on the need for a longer period of rehabilitation than could be provided through the juvenile justice system. But the need for longer rehabilitation (which necessarily encompasses an assessment that the individual is amenable to rehabilitation) not only fails to further the inquiry necessary for death-eligibility; it is directly inconsistent with the use of capital punishment.

Thus, Missouri's transfer system does not ask the questions necessary for rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, supra, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). The factors that render a child transferable and thus death-

eligible bear no connection whatsoever to the considerations that this Court has deemed relevant to capital punishment. In short, the use of transfer as a mechanism for defining the death-eligible population of children renders the death penalty "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, supra, 408 U.S. at 309 (Stewart, J., concurring).

CONCLUSION

Amici respectfully submit that a society bounded by an injunction not to inflict cruel and unusual punishment, as measured by evolving standards of decency, should recognize as a categorical rule of law that no person may be executed for an offense committed while under the age of eighteen years. Amici urge this Court to reverse the judgments of the Supreme Courts

of Georgia and Missouri insofar as they uphold the imposition of petitioners' sentences of death.

Dated: New York, New York
August 31, 1988

Respectfully submitted,

RANDY HERTZ
MARTIN GUGGENHEIM
New York University
School of Law
715 Broadway -- 4th Floor
New York, New York 10003
(212) 998-6430

Attorneys for Amici Curiae

Supreme Court, U.S.

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**BRIEF FOR AMICUS CURIAE
AMNESTY INTERNATIONAL
IN SUPPORT OF PETITIONERS**

(ATTORNEYS FOR AMICUS CURIAE
LISTED ON BACK OF FRONT COVER)

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**BRIEF FOR AMICUS CURIAE
AMNESTY INTERNATIONAL
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NIGEL RODLEY
AMNESTY
INTERNATIONAL
1 Easton Street
London WC1X 8DJ
01-833-1771

JANE G. ROCAMORA
JOHN E. OSBORN
IAN CRAWFORD
AIUSA
58 Day Street
Somerville, MA 02144
(617) 623-0202

PAUL L. HOFFMAN
(Counsel of Record)
JOAN FITZPATRICK
JOAN W. HOWARTH
MARY E. MCCLYMONT
DAVID WEISSBRODT
AIUSA

633 S. Shatto Pl.
Los Angeles, CA
90005
(213) 487-1720

ALICE M. MILLER
JESSICA NEUWIRTH
AIUSA
322 Eighth Avenue
New York, NY 10001
(212) 807-8400

Attorneys for AMICUS CURIAE
AMNESTY INTERNATIONAL

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BRIEF OF AMNESTY INTERNATIONAL

INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Amnesty International ("AI"), with the consent of the parties.¹

Amnesty International is an independent international human rights organization which (1) seeks the release of "prisoners of conscience" -- men and women detained anywhere because of their beliefs, color, sex, ethnic origin, language or religious creed, provided they have not used or advocated violence; (2) works for fair and prompt trials for all political prisoners and on behalf of such people detained without charge or trial; and (3) opposes the death penalty and torture or other cruel inhuman or degrading

¹ The parties' letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

treatment or punishment of all prisoners without reservation. AI acts on the basis of the Universal Declaration of Human Rights and other international human rights instruments. Amnesty International opposes the death penalty unconditionally, believing it to be the ultimate cruel, inhuman and degrading punishment and a violation of the right to life, as proclaimed in the Universal Declaration and other international human rights instruments.

Amnesty International was founded in London in 1961 and now has sections in forty-four countries (in Africa, Asia, the Americas, Europe and the Middle East), including the United States, with more than 700,000 individual members, subscribers and supporters in 150 countries. There are more than 3,800 local AI groups in more than 60 countries

working in support of all aspects of AI's mandate. Since Amnesty International was founded AI groups have intervened on behalf of more than 25,000 prisoners in over a hundred countries with widely differing ideologies. In 1977, AI received the Nobel Prize for its work.

Amnesty International has formal consultative status, or similar formal relations, with the United Nations, UNESCO, the Organization of American States, the Council of Europe and the Organization of African Unity.

In February 1987, AI initiated a worldwide campaign urging states within the United States which retain the death penalty to abolish it. The campaign was based upon a 240-page report which discusses all aspects of the death penalty as implemented in the United States, including the execution of

juvenile offenders. United States of America: The Death Penalty, at 65-75 (February 1987).

Amnesty International does not approve of and would not defend any violent crime. However, AI regards the death penalty -- particularly as applied to crimes committed by juvenile offenders-- as cruel, inhuman and degrading treatment and incompatible with respect for the inherent dignity of the human person.²

With respect to the execution of juvenile offenders,³ there exists a well developed, unequivocal international

²Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.")

³ The term "juvenile," "child" or "juvenile offender" as used in this brief refers to a person who was under 18 at the time they committed their crime in accordance with the internationally recognized legal standards described in this brief.

legal and moral consensus prohibiting all nations from executing juvenile offenders for their crimes. However heinous the crime, the imposition on a young person of a sentence of utmost cruelty, which denies the possibility of rehabilitation or reform, is contrary to contemporary standards of justice and humane treatment in every corner of the world.

AI filed an amicus curiae brief last Term in Thompson v. Oklahoma. This brief is similar in substance to the brief filed in the Thompson case; however, it includes additional, updated information about international law and practices relating to the execution of juvenile offenders.

In the past two years AI has learned about a significant number of additional countries from different regions of the

world which have incorporated the prohibition against juvenile execution in their national legislation. These countries include Bahrain, Belize, Cuba, Ethiopia, Greece, Guinea, Kenya, Liberia, Malawi, Niger, Oman, Republic of China (Taiwan), Saudi Arabia, Sierra Leone, Swaziland, Syria, Tanzania, Yugoslavia and Zambia. Moreover, since AI filed its brief in the Thompson case in May 1987 the only reported executions of juvenile offenders are unconfirmed reports of such executions in Iraq on two occasions.

Hence, the evidence upon which AI's amicus curiae brief in the Thompson case was based is even more overwhelming in support of the international standard against juvenile execution at this time.

SUMMARY OF ARGUMENT

In this brief, Amnesty International,

based on its knowledge of national practices regarding the execution of juvenile offenders and its participation since 1961 as an observer in the development of international legal standards in this area, presents a summary of the massive evidence showing that there is a well established internationally recognized legal standard prohibiting the execution of juvenile offenders who were under 18 at the time of their crimes. This evidence includes widely ratified multilateral treaties and the laws and practices of almost all of the nations of the world.

The evidence of international consensus on this issue is overwhelming. Virtually every nation in the world, including the United States, has ratified treaties which prohibit the execution of juvenile offenders in some circumstances (e.g.,

during wartime). The majority of nations have ratified treaties which prohibit the execution of juvenile offenders in all circumstances. Even those countries which retain the death penalty have almost uniformly rejected the practice of juvenile execution as a violation of international standards of law and morality. There have also been numerous additional international expressions of the prohibition against the execution of juvenile offenders in the work of various international bodies. Moreover, the United States has been an active participant in these developments for decades and has never objected to the development of these internationally recognized legal standards prohibiting the execution of juvenile offenders.

Amnesty International hopes and expects that the body of internationally

recognized legal standards and opinion will be considered with great seriousness by this Court in determining whether the execution of Heath A. Wilkins or Jose Martinez High for crimes committed when they were below eighteen years of age, would violate the Eighth Amendment's prohibition against cruel and unusual punishment. The international community has achieved a consensus on this question which is highly relevant to this Court's Eighth Amendment analysis under Trop v. Dulles, 356 U.S. 86, 101 (1958), and its progeny. See, e.g., Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, J., plurality opinion); Coker v. Georgia, 433 U.S. 584, 586 n. 10 (1977); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982).

In Thompson v. Oklahoma, ___ U.S. ___,

108 S.Ct. 2687 (1988), a plurality of this Court found that the international consensus prohibiting the execution of juvenile offenders supported the growing consensus in the United States against this practice in the context of a person who was 15 at the time of his crime. 108 S.Ct. at 2689, 2696. The same international standard supports the conclusion that the execution of persons who were 16 or 17 at the time of their crimes is cruel and unusual punishment.

In the past decade only a handful of juvenile offenders have been executed by governments in the world. Since 1979 out of the thousands of executions recorded by Amnesty International, only eight were reported to have been executions of juvenile offenders. These executions occurred only in Bangladesh, Barbados, Pakistan (two), Rwanda and the United

States (three). There have also been unconfirmed reports of executions of juvenile offenders in Iraq and Iran in recent years. Indeed, with the possible exception of unconfirmed juvenile executions in Iraq, there has been no recorded execution of a juvenile offender in the world since the execution of Jay Kelly Pinkerton in Texas on May 15, 1986. These "unusual" events stand against a nearly universal consensus of the international community that the execution of juvenile offenders violates internationally recognized legal standards and is offensive to contemporary international norms of moral decency.

The fact that the execution of juvenile offenders conflicts with internationally recognized legal standards deserves to be given particular weight in this Court's

constitutional analysis. It would be regrettable if constitutional guarantees under the United States Constitution were to be found to provide significantly less protection than the protection afforded by international norms on important issues of human rights and fundamental freedoms. The issue of whether juvenile offenders may be put to death is just such a fundamental human rights issue for the United States and for the international community. Amnesty International urges this Court to recognize the significance of the position taken by the international community on this issue by preventing the execution of Heath A. Wilkins and Jose Martinez High under the Eighth Amendment of the United States Constitution.

ARGUMENT

I.

INTERNATIONALLY RECOGNIZED LEGAL STANDARDS AND NATIONAL PRACTICES SUPPLY COMPELLING EVIDENCE THAT THE EXECUTION OF JUVENILE OFFENDERS CONSTITUTES CONSTITUTIONALLY PROSCRIBED CRUEL AND UNUSUAL PUNISHMENT

- A. This Court Has Looked to Internationally Recognized Legal Standards and the Practices of Other Nations to Determine the Meaning of "Cruel and Unusual Punishment" Under the Eighth Amendment

As this Court recognized in 1910, the Eighth Amendment prohibition against cruel and unusual punishment "is not fastened to the obsolete." Weems v. U.S., 217 U.S. 349, 378 (1910). A half-century later, this Court again emphasized that the Eighth Amendment "must derive its meaning from evolving standards of decency that mark the progress of a maturing society." Trop v.

Dulles, 356 U.S. 86, 101 (1958).

As befits a nation mindful of its place within the international community, the plurality opinion in Trop did not rely solely upon American society as its benchmark for determining "evolving standards of decency" for this purpose. In Trop, the fact that the overwhelming majority of nations did not employ denaturalization as a punishment for desertion was a significant factor in this Court's decision. Trop, supra, 356 U.S. at 102-03.

International standards are now an established aspect of Eighth Amendment analysis,⁴ particularly regarding limits on the use of executions as a penalty.

⁴See also, Lareau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980), modified on different grounds, 651 F.2d 96 (2d Cir. 1981); Sterling v. Cupp, 20 Or. 611, 625 P.2d 123 (1981), for the application of this principle in a different context.

In Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977), for instance, this Court noted that as of 1965 only three major nations in the world retained the death penalty for rape. That international perspective informed the Coker decision that the imposition of the death penalty for the rape of an adult woman is "cruel and unusual" within the meaning of the Eighth Amendment. Id.

In Enmund v. Florida, 458 U.S. 782, 796 n. 22 (1982), this Court again turned toward the "climate of international opinion" as one basis for the determination that imposition of a death sentence upon a defendant who had not intended to kill is cruel and unusual punishment. Id. In Enmund this Court looked particularly to the practices of countries in Europe and of countries currently or formerly in the British

Commonwealth. Id.

In Thompson v. Oklahoma, supra, a plurality of this Court recognized the relevance of international standards and practices regarding the execution of juvenile offenders in interpreting the Eighth Amendment to prohibit the execution of an offender who was 15 at the time of his crime. 108 S.Ct. at 2696. The evidence of international standards and practices relied upon by the plurality in Thompson is equally compelling in the context of the execution of offenders who were 16 or 17 at the time of their crimes. The international community has clearly fixed the age of 18 as the dividing line between juvenile and adult offenders for the implementation of the death penalty.

As the plurality in Thompson recognized, the force of international

practice and opinion is even stronger against executions for crimes committed by juvenile offenders than it was for rapes (in Coker) or for unintended killings (in Enmund). The laws and practices of other nations as well as numerous international treaties, declarations and resolutions, demonstrate that evolving standards of decency of a maturing international community prohibit the execution of juvenile offenders, including the petitioners before the Court in these cases.

When this Court recognized nearly 30 years ago in Trop that the United States Constitution -- and in particular the Eighth Amendment -- cannot be interpreted in isolation from international legal standards and practices, the movement toward an international system for the protection of international human rights

was in its early stages. International human rights law has now become an established, essential and universally accepted part of the life of the international community. L. Henkin, Introduction, in "The International Bill of Rights," at 1 (1981). Individuals, including the people of the United States, are now understood to possess remediable rights based on international law. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).⁵

Justice Scalia's dissent in Thompson, 108 S.Ct. at 2711, criticized the reliance on international standards and practice for any purpose in the interpretation of the Eighth Amendment.

⁵ See generally, Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555 (1984); See also Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal 1987).

This view appears to be at variance with the Eighth Amendment jurisprudence of this Court and with the history of the application of international law generally by United States courts.⁶

Some benchmark exterior to the challenged penal legislation itself must guide the interpretation of the Eighth Amendment if that provision is to have any enforceable meaning. Nothing in logic, history or the jurisprudence of this Court suggests that the practices and standards of the international

⁶ As the Second Circuit, echoing the words of this Court in The Paquete Habana, 175 U. S. 677, 700 (1900), emphasized in Filartiga v. Pena-Irala, supra:

[T]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became part of the common law of the United States upon the adoption of the Constitution. 630 F.2d at 886.

community must be ignored in framing that benchmark.

The text, history and jurisprudence of the Eighth Amendment are uniquely well suited to the consideration of evolving standards of decency around the globe. Even if it were the case that the United States would ignore international consensus where a conflict between international and domestic standards is clear, the issue before this Court does not present such a clear conflict. The execution of juvenile offenders appears to have only a tenuous hold on American society.⁷ Clearly, American society is

⁷ This is reflected by the fact that there has been only one death judgment involving a juvenile offender in the United States since early 1987. The only such sentence appears to be the death sentence imposed on Bernell Hegwood in Florida in 1988. Streib, "The Imposition of Death Sentences for Juvenile Offenders, January 1, 1982, Through June 24, 1988." (Unpublished Memorandum, June

moving toward the strong international consensus that already exists on this issue.

The United States has played an important role in fostering the development of international human rights law in the past half century.⁸ In particular, the United States participated, without protest, in the development over the past forty years of an international norm prohibiting the execution of juvenile offenders. See generally, Hartman, The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U.

24, 1988)

⁸ In the past 15 years Congress has incorporated international human rights standards in dozens of laws. This legislation is collected in Human Rights Documents: Compilation of Documents Pertaining to Human Rights, Committee on Foreign Affairs (September 1983), at 24-58.

Cinn. L. Rev. 655, 682-686 (1983).

It would be a matter of grave regret to the international community if the massive evidence of laws and practice throughout the world prohibiting executions for crimes committed by juvenile offenders and the treaties condemning such executions were to be ignored in the interpretation the Eighth Amendment of the United States Constitution in these cases. The global outcry against executions for crimes committed by juvenile offenders has risen to the strength of an internationally recognized standard which should be respected by the United States and all other countries in the world.

B. Internationally Recognized Legal Standards and National Practices Condemn the Punishment of Death for Crimes of Juvenile Offenders

In this section Amnesty International

presents the evidence that internationally recognized legal standards prohibit execution of juvenile offenders. Evidence of such standards, even emerging standards, is precisely the type of evidence entitled to persuasive weight under Trop, Coker, and Enmund and Thompson. Amnesty International urges this Court to give great weight in its Eighth Amendment analysis to the overwhelming consensus of international standards and practices on this issue.

1. National Laws and Practices

144 countries, including almost all Western European countries, either have abolished the death penalty for all offenses, or have forbidden it for ordinary criminal offenses, or have excluded it for certain offenders,

including juvenile offenders.⁹ Significantly, these nations range widely in political, regional and cultural diversity.

Thirty-four countries have completely abolished the death penalty. Twenty additional countries provide for the death penalty only for exceptional crimes such as crimes under military law, or for crimes committed under exceptional circumstances. Sixty-five of the countries which retain the death penalty for common crimes have statutory provisions recognizing juvenile offenders as exempt from the death

⁹ A list of all retentionist and abolitionist nations is included in the Appendix at A-1 through A-7. Retentionist countries that have prohibitions against the execution of juvenile offenders in their national legislation are identified in the Appendix at A-3 through A-7.

penalty.¹⁰

Twenty-five of the remaining sixty-one retentionist countries have ratified the International Covenant on Civil and Political Rights or the American Convention on Human Rights both of which prohibit the execution of persons who were under 18 at the time of their crimes. Thus, only thirty-six countries out of the 180 countries and territories listed in the Appendix have not formally abolished execution for juvenile offenders either in their national legislation or by ratifying a treaty prohibiting this practice. In the vast majority of these countries there has not been an execution of a juvenile offender for more than a decade. Only five

¹⁰ See Appendix, at A-3 to A-7. These statistics are taken from information in AI's files. See also, Hartman, supra, at 666 n. 44.

countries, with the possible addition of Iran and Iraq, have actually engaged in this universally condemned practice in the past decade. Significantly, the vast majority of countries which retain the death penalty have embraced the international consensus that the execution of juvenile offenders violates basic principles of humanity and decency in the international community.

In the United States 26 of 51 jurisdictions, including the District of Columbia, expressly prohibit the execution of juvenile offenders.¹¹ Thus, in more than half of U. S. jurisdictions the juvenile offenders before this Court would be ineligible for the death

¹¹ The information about death penalty legislation in U.S. jurisdictions is taken from footnotes 25, 26, 29 and 30 in Thompson. 108 S.Ct. at 2694-96.

penalty.

In 19 other jurisdictions there is no minimum age specified in the death penalty statute. Without such an explicit legislative judgment on this fundamental question it cannot be said that these states have deliberately chosen to reject the international standard prohibiting juvenile executions. 108 S. Ct. at 2706 (O'Connor, J., concurring). Only six jurisdictions have specifically set a minimum age for the death penalty which is contrary to the international standard described in this brief.¹²

The key point is that there does not appear to be a political consensus in the

¹² These six jurisdictions are Georgia (age 17), Indiana (age 16), Kentucky (age 16), Nebraska (age 16), North Carolina (age 17) and Texas (age 17). 108 S. Ct. at 2696 n.30.

United States in favor of the execution of juvenile offenders who were under 18 at the time of their crimes. In fact, the evidence strongly suggests a movement toward the international consensus in opposition to this practice. This growing consensus is underscored by the declarations of various representative American legal bodies, including the American Law Institute and the American Bar Association, which have publicly opposed the execution of juvenile offenders.¹³

¹³ American Law Institute Model Penal Code § 210.6 commentary at 133. (Official Draft and Revised Comments (1980) ("Civilized societies will not tolerate the spectacle of execution of children...") American Bar Association, summary of Action of the House of Delegates 17 (1983) Annual Meeting) ("Be it resolved, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18).")

While some nations still retain the possibility of executing juvenile offenders in their laws, the actual practices of nations indicate that the execution of juvenile offenders is exceedingly rare. Although 81 nations reportedly performed executions between 1973 and 1982, only two juvenile offenders were reported to have been executed during that period.¹⁴ Moreover, the Secretary-General of the United Nations noted in 1973 that "[t]he great majority of Member States [of the United Nations] report never condemning to death

¹⁴ Hartman, supra, at 666-67 n. 44. This data is based on the reports of more than 70 nations to the United Nations for the period in question. In addition, one non-reporting country is known to have carried out the execution of a juvenile offender in 1982.

persons under 18 years of age."¹⁵

Amnesty International has collected data showing that since 1979 there have been more than 11,000 judicially sanctioned executions in over 80 countries; however, only eight persons who committed their offense while under the age of 18 were known to have been executed during that period. Five of these executions took place in: Pakistan (two), Barbados, Bangladesh and Rwanda (one each). The other three took place in the United States: Charles Rumbaugh (executed in Texas September 11, 1985, after dropping his final appeals), James Terry Roach (executed in South Carolina January 10, 1986) and Jay Pinkerton (executed in Texas May 15, 1986). There

¹⁵ United Nations Economic and Social Council, Report of the Secretary General on Capital Punishment at 10, U.N. Doc. E/5242 (1973).

are also unconfirmed reports of executions of juvenile offenders in Iraq and Iran. In the rest of the world, as in the United States,¹⁶ being put to death for a crime committed as a juvenile is indeed "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

2. Major Human Rights Treaties Prohibit The Execution of Juvenile Offenders

The repugnance around the world towards executions for crimes committed by children has elevated this question beyond national reform into the arena of international concern and action.

¹⁶See Streib, Death Penalty for Juveniles, Indiana University Press, (1987), at 55-71. H. Bedau (ed.), the Death Penalty In America 52-56 (1964); J. Laurence, the History of Capital Punishment 16-18 (1960).

Numerous international treaties and resolutions, declarations and other international documents reflect the international consensus against execution of juvenile offenders who were under 18 at the time of their crime. See N. Rodley, The Treatment of Prisoners Under International Law at 186 (1987). At least three major human rights treaties explicitly prohibit the imposition of the death penalty on juvenile offenders who were under 18 at the time of their crimes.¹⁷

¹⁷ American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, Doc. 65 Rev. 1 Corr. 2 (1970), Art. 4(5); International Covenant on Civil and Political Rights, Art. 6(5), Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, § 75 U.N.T.S. 287, Art. 68

Protocol No. 6 to the European

The United States has ratified one of these treaties and has signed the other two. The fact that the United States has not yet ratified either the International Covenant on Civil and Political Rights or the American Convention on Human Rights does not dilute the binding force of the norms in these treaties which are part of customary law. In fact, the assumption of the drafters of both of these human rights treaties was that the prohibition against juvenile execution embodied in the treaties was already an accepted international standard. See §§ b and c, infra.

Convention of Human Rights, ratified by ten nations and signed by all but six of the twenty-one Member States of the Council of Europe, abolishes the death penalty entirely for crimes during peacetime. Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114, reprinted in 22 I.L.M. 539 (1983).

a. Fourth Geneva Convention

The almost universally ratified Fourth Geneva Convention of 1949, concerned with the protection of civilians in time of war, prohibits the execution of juvenile offenders in the context of war--perhaps the most threatening period in any nation's existence. Article 68 of the Fourth Geneva Convention provides:

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense.¹⁸

The ratifying countries of the Geneva Convention -- 165 nations, including the United States -- virtually cover the

¹⁸The two additional Protocols to the Geneva Conventions of 1949, adopted in 1977, both rule out the death penalty for crimes committed by juvenile offenders. Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 76; Geneva Protocol II Additional to Geneva Conventions of August 12, 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts, Article 6. The United States has signed both additional Protocols. In January, 1987, President Reagan announced that the United States would not ratify additional Protocol I; however, this action was taken for reasons other than the provisions of Article 76. Message From the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-international Armed Conflicts concluded at Geneva on June 10, 1977, 100th Cong., 1st Sess., Treaty Doc. 100-2 (1987).

globe.¹⁹ Thus, the United States has been a part of the development of the international norm against juvenile execution for nearly 40 years. If nearly all the nations of the world, including the United States, have agreed to prohibit the execution of juvenile offenders during periods of international armed conflict, this internationally recognized standard ought to apply with even greater force during peacetime.

b. International Covenant on Civil and Political Rights

Article 6(5) of the International Covenant on Civil and Political Rights, declares:

¹⁹ The only nations which have not ratified the Geneva Conventions are Bhutan, Brunei, Burma, Maldives and Nauru. Kiribati has also not ratified the Conventions but they remain applicable to it by virtue of a provisional declaration of application of the treaties.

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall be not carried out on pregnant women.

Eighty-seven nations of the world, including most of the Western European countries and Canada, have ratified this Covenant. Another seven nations, including the United States, have signed it.²⁰

The debates surrounding the adoption of Article 6 of the International Covenant on Civil and Political Rights demonstrate that no opposition arose against the view that permitting executions of juvenile offenders was contrary to human rights principles.²¹ The travaux preparatoires reveal that the drafters of Article 6

²⁰ The nations which have ratified or signed the Covenant are identified in the Appendix.

²¹ Hartman, supra, at 671-72.

believed that the prohibition against the execution of juvenile offenders represented a consensus of nations and never questioned the validity of this consensus.²²

In fact, the travaux make clear that the Article 6(5) prohibition was no more than the codification of an already existing binding norm.²³ The U.N. General Assembly resolution which recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States, not only ratifying states,²⁴ is further

²² Id. at 672 and n. 64, and citations noted therein.

²³ Id.

²⁴ Id. at 681 n. 94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Although the United States did not participate in the Article 6 debates, it did support this General Assembly resolution. Id. at 685, 684 n. 106, 681 n. 94.

evidence of State practice supporting the position that the prohibition against the execution of juvenile offenders is an internationally recognized legal standard.

c. American Convention on Human Rights

Article 4(5) of the American Convention on Human Rights²⁵ also prohibits the executions contemplated in these cases:

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.²⁶

²⁵ This treaty has been ratified by nineteen American States and signed by an additional three countries, including the United States. A list of nations which have ratified or signed the American Convention is included in the Appendix.

²⁶ On March 27, 1987, the Inter-American Commission on Human Rights of the Organization of American States held that the United States violated Article 1 (right to life) and Article 2

The drafters of the American Convention, recognizing that total abolition of the death penalty was not possible in the context of the Convention, imposed important limitations on the use of executions, including the prohibition of the execution of juvenile

(prohibition of discrimination) of the American Declaration on the Rights and Duties of Man by permitting the execution of juvenile offenders. OAS IACHR Res. 3/87, Case No. 9647, (Roach and Pinkerton v. United States), OEA Ser. L/V/II 69, Doc. 17 (March 27, 1987). The Commission stated in dictum that there was a peremptory norm of international customary law prohibiting the execution of juvenile offenders. *Id.* at Para. 56. Although the Commission did not find that age 18 was the universally accepted dividing line between juvenile and adult offenders for this purpose, it did state that there was an "emerging" norm setting the age of 18 as the minimum age for the imposition of the death penalty. *Id.* at Para. 60. This decision did not address Article 4(5) of the American Convention because the United States has not yet ratified the Convention.

offenders.²⁷ Moreover, the draft proposal of Article 4(5) was patterned after the International Covenant's prohibition on the executions of juvenile offenders, thus demonstrating a belief that such a prohibition constituted the prevailing international standard.²⁸

The travaux of the American Convention indicate that the United States' delegation did not oppose per se the notion that the execution of juvenile

²⁷ Although the motion for total abolition of the death penalty did not carry, no vote was cast against it. T. Buergenthal & R. Norris, Human Rights: The Inter-American System (1982), at 248, Booklet 12. The Rapporteur noted that the drafters acted according to the "trend in the Americas toward eliminating [capital] punishment". Report of the Rapporteur of Committee I. *Id.* at 162. A number of delegations also expressed hostility toward any use of the death penalty. See Minutes, 3d Session of Committee I, *id.* at 36-38.

²⁸ See, Hartman, *supra*, at 672-73 n. 66, and the sources cited therein.

offenders should be prohibited. Rather the United States delegation appeared more concerned that setting specific age limits on the exercise of the death penalty did not adequately take into account the "already apparent" trend toward gradual abolition of the death penalty. The U.S. stated:

The proscription of capital punishment within arbitrary age limits presents various difficulties in law, and fails to take account of the general trend, already apparent, for the gradual abolition of the death penalty... For this reason we believe the text will be stronger and more effective if this paragraph is deleted. [Emphasis added.]

Observations and Proposed Amendments to the Draft of the Inter-American Convention on the Protection of Human Rights, T. Buerghenthal and R. Norris, supra, Booklet 13, at 152.

d. These Treaties Reflect an International Consensus Against The Execution of Juvenile Offenders

The Fourth Geneva Convention, the International Covenant on Civil and Political Rights, and the American Convention, along with their travaux preparatoires provide strong evidence that there exists a high degree of consensus among a large number of nations that the execution of juvenile offenders is forbidden under international law.

Under both the International Covenant on Civil and Political Rights (Article 4(2)), and the American Convention on Human Rights (Article 27(2)), the prohibitions against the execution of juvenile offenders admit of no derogation

even during national emergencies.²⁹ The United States Government has ratified the Geneva Conventions and has signed but not

²⁹ Likewise, under Article 3 of Protocol No. 6 to the European Convention on Human Rights, no derogation from the Protocol is allowed nor may reservations in respect of the Protocol be made under its Article 4. Recently, the European Parliament passed a resolution (Doc. B 2-220/85) calling upon all Council of Europe and European Community Member States who had not yet adhered to the Protocol to do so as soon as possible. The resolution welcomed "the continuing trend towards abolition of the death penalty in Member States of the European Community" and noted that "the death penalty is a form of cruel, inhuman and degrading punishment and a violation of the right to life, even when scrupulous legal procedures are followed." Report on the abolition of the death penalty and accession to the Sixth Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1985-86 Eur.Doc. A2-167/85 at 10 (1985). In September 1987 the European Community passed a resolution in which is expressed its "deep concern" that "in 26 states (of the United States) persons under 18 can be sentenced to death..." Resolution of the European Parliament, "Political Relations between the European Community and the United States," Eur. Doc. A2-105/87 (September 16, 1987), para 16 at 20.

yet ratified the two other conventions.³⁰ The fact that the United States has not yet ratified the Covenant or the American Convention does not in any way suggest that the United States is not bound by the norm prohibiting juvenile execution.

³⁰ President Carter sent the International Covenant and American Convention, and two other treaties, to the Senate for its advice and consent on February 23, 1978. Human Rights Treaties, President's Message to the Senate, 14 Weekly Comp. Pres. Doc. 395 (Feb. 27, 1978). Although the President proposed reservations to the American Convention and the International Covenant upon their transmittal to the Senate, the Administration noted that the reservations were intended simply to avoid criticisms and implementation difficulties and "certainly not the preservation of any right to execute children or pregnant women, something never done in the United States." Response by the Department of State to the "Critique of Reservations to the International Human Rights Covenants" by the Lawyers Committee for International Human Rights, International Human Rights Treaties: Hearings before the Committee on Foreign Relations, 96th Cong., 1st Sess. 1, 55 (1979), noted in Hartman, supra, at 685 and n. 112.

On the contrary, these treaty prohibitions provide important and authoritative evidence of the international consensus against the execution of juvenile offenders.

3. Repeated Actions by the United Nations Condemn The Execution of Juvenile Offenders

The actions of the United Nations provide further evidence of the norm prohibiting the execution of juvenile offenders. The U.N. Economic and Social Council (ECOSOC) has adopted, pursuant to a resolution, safeguards relating to the death penalty, one of which was a prohibition against the execution of persons who committed crimes below the age of 18 years. E.C.S. Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984). The U.N. General Assembly has endorsed these safeguards and asked the Secretary-General "to

employ his best endeavors in cases where the safeguards . . . are violated." G.A. Resolution 39/118, U.N. Doc. A/39/51, at 211, Oper. paragraphs 2 and 5 (1984).

In September 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, endorsing the ECOSOC safeguards and urging all states retaining the death penalty to implement them. The U.S. joined in the consensus on this resolution. Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) U.N. Doc. A/Conf.121/22 (1985), at 86-87. Indeed, the ECOSOC safeguards have become universally accepted minimum standards regarding the implementation of the death penalty.

Similarly, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), also adopted by the Seventh Congress and the United Nations General Assembly without dissent by the United States, provide: "Capital punishment shall not be imposed for any crime committed by juveniles." G.A. Res 40/33, Nov. 29, 1985, Annex, rule 17.2.

These repeated expressions of the international consensus in opposition to the execution of juvenile offenders who were under 18 at the time of their crimes leaves no room for doubt about the international obligations of the United States on this fundamental issue. The members of the international community have an expectation that all countries, including the United States, will refrain from executing juvenile offenders even in

countries which retain the death penalty for adult offenders.

CONCLUSION

"Children have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring), repeated in Eddings v. Oklahoma, 455 U.S. 104, 116 n. 12 (1982). As this Court emphasized in Eddings, "... youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. This Court and state and federal legislatures throughout the United States have frequently recognized that minors, especially in their early years, generally are less mature and responsible than adults. Thompson, 108 S.Ct. at 2692-93. Particularly 'during the formative years

of childhood and adolescence, minors often lack the experience, perspective and judgment' expected of adults. Even the normal 16 year old customarily lacks the maturity of an adult." Id. at 116, citing Bellotti v. Baird, 443 U.S. 622 (1979).

Violent crime is a serious problem in nearly every nation. The universal truth of Justice Frankfurter's observation in May v. Anderson, however, is equally transcendent over national boundaries. With a handful of notorious exceptions, the laws, practices and treaties of the nations of the world reflect this truth by prohibiting the penalty of death for crimes committed by children.

These internationally recognized legal standards prohibiting the execution of juvenile offenders were developed in recognition of the fact that the death

penalty -- with its uniquely cruel and irreversible character -- is a particularly inappropriate penalty for individuals who have not attained full physical or emotional maturity at the time of their actions. Children and adolescents are widely recognized as being less responsible for their actions than adults, and more susceptible to rehabilitation, thus rendering the death penalty a particularly inhumane punishment in their cases. Criminologists have also noted that arguments used to support the death penalty are especially inapplicable in the case of young people. It is recognized that children and adolescents are more liable than adults to act on impulse, or under the influence or domination of others, with little thought for the long-term consequences of their

actions, and they are particularly unlikely to be deterred by the death penalty. Many young people who commit brutal crimes themselves come from brutalized and deprived backgrounds. To impose the death penalty in such cases, whether as retribution or as an intended deterrent, violates basic principles of humanity.

The Eighth Amendment of the Constitution of the United States offers a strong guarantee of basic human rights to the people of the United States in part because it cannot be interpreted in isolation from the human rights norms of the international community. The Eighth Amendment, like the laws, practices and treaties of the rest of the world, should be understood as prohibiting the killing of anyone as punishment for crimes committed as a child and thus should be

found to prohibit the execution of Heath A. Wilkins and Jose Martinez High. By so holding, this Court will reaffirm the essential role of the United States Constitution as the basic charter of a nation committed to respect for human rights.

The ruling in this case will matter not simply to these two young men, or to the handful of other juvenile offenders already sentenced to die in the United States, or even just to the people of the United States. In truth, the attention of the world at large will be justifiably concerned about United States' adherence to this widely accepted international standard. Though this Court's role is to expound a constitution applicable to persons within the United States, this Court has long recognized that "evolving standards of decency" in the world cannot

and should not be excluded from its constitutional analysis under the Eighth Amendment. "Evolving standards of decency" in the United States and throughout the world require that these death sentences be set aside.

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Respectfully submitted,

PAUL L. HOFFMAN*
(COUNSEL OF RECORD)
JOAN FITZPATRICK
JOAN W. HOWARTH
MARY E. McCLYMONT
DAVID WEISSBRODT
NIGEL S. RODLEY
ALICE MILLER
JESSICA NEUWIRTH
JANE G. ROCAMORA
JOHN E. OSBORN
IAN CRAWFORD

Attorneys for Amnesty International

APPENDIX

APPENDIX

ABOLITIONIST AND RETENTIONIST
COUNTRIES (AS OF APRIL 1987)

August 1988

ABOLITIONIST BY LAW FOR ALL CRIMES

(Countries whose laws do not provide for
the death penalty for any crime)

	ICCPR*	AMER CONV
Australia	x	
Austria	x	
Cape Verde		
Colombia	x	x
Costa Rica	x	x
Denmark	x	
Dominican Republic	x	x
Ecuador	x	x
Finland	x	
Federal Republic of Germany	x	
France	x	
German Democratic Republic		
Haiti		x

*Countries which have ratified or
acceded to the International Covenant on
Civil and Political Rights or the
American Convention on Human Rights are
noted by an "x" and countries which have
signed, but not ratified, these treaties
are noted by an "s."

	<u>ICCPR</u>	<u>AMER CONV</u>
Holy See		
Honduras	s	x
Iceland	x	
Kiribati		
Lichtenstein		
Luxembourg	x	
Marshall Islands		
Microneasia		
Monaco		
Netherlands	x	
Nicaragua	x	x
Norway	x	
Panama	x	x
Philippines	x	
Portugal	x	
Solomon Islands		
Sweden	x	
Tuvalu		
Uruguay	x	x
Vanuatu		
Venezuela	x	x
Total: 34 countries		

ABOLITIONIST BY LAW FOR ORDINARY CRIMES ONLY.

(Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime)

Argentina	x	x
Bhutan		
Brazil		
Canada	x	
Cyprus	x	
El Salvador	x	x

	<u>ICCPR</u>	<u>AMER CONV</u>
Fiji		
Israel	s	
Italy	x	
Malta		
Mexico	x	x
New Zealand	x	
Papua New Guinea		
Peru	x	x
San Marino	x	
Sao Tome and Principe		
Seychelles		
Spain	x	
Switzerland		
United Kingdom	x	
Total: 20 countries		

RETENTIONIST

(Countries and territories whose laws provide for the death penalty for ordinary crimes. However, some of these countries have not in practice carried out executions in recent years.)

*Countries marked with an * have not executed anyone for at least the last 10 years (and in some cases for decades) and may be considered abolitionist de facto. 27 countries and territories fall within this category.

**This column indicates countries which have prohibitions against the execution of juvenile offenders in their national legislation based on the most current information available to AI. This survey is not necessarily complete and other countries may also have such legislation.

	ICCPR	AMER CONV	JUV** PROHB
Afghanistan	x		x
Albania			x
Algeria	s		x
Andorra*			
Angola			x
Anguilla*			x
Antigua and Barbuda			x
Bahamas			x
Bahrain*			x
Bangladesh			
Barbados	x	x	
Belgium*	x		
Belize			x
Benin			
Bermuda			
Bolivia*	x	x	
Botswana			x
British Virgin Islands*			
Brunei			
Darussalam*			x
Bulgaria	x		x
Burkina Faso			
Burma			
Burundi			x
Cameroon	x		x
Cayman Islands*			x
Central African Republic	x		
Chad			
Chile	x	s	
China (People's Republic)			
Comoros*			
Congo	x		
Cuba			x
Czechoslovakia	x		x

A-4

	ICCPR	AMER CONV	JUV** PROHB
Djibouti*			
Dominica			x
Egypt	x		x
Equatorial Guinea	x		
Ethiopia			x
Gabon	x		
Gambia*	x		
Ghana			
Greece*			x
Grenada		x	x
Guatemala		x	
Guinea	x		x
Guinea-Bissau			x
Guyana	x		
Hong Kong*			
Hungary	x		x
India	x		
Indonesia			
Iran	x		
Iraq	x		
Ireland*	s		
Ivory Coast*			
Jamaica	x	x	x
Japan	x		x
Jordan	x		x
Kampuchea	x		
Kenya	x		x
Korea (Dem. People's Rep.)			
[No. Korea]	x		
Korea (Rep.)			
[So. Korea]			
Kuwait			x
Laos			
Lebanon	x		
Lesotho			x
Liberia	s		x

A-5

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV** PROHB</u>
Libya	x		x
Madagascar*	x		x
Malawi			x
Malaysia			
Maldives*			
Mali*	x		x
Mauritania			
Mauritius	x		
Mongolia	x		x
Montserrat*			x
Morocco	x		
Mozambique			
Namibia			
Nauru*			
Nepal			
Niger*	x		x
Nigeria			
Oman			x
Pakistan			
Paraguay*		s	x
Poland	x		x
Qatar*			
Romania	x		x
Rwanda	x		
Saint Christopher and Nevis			x
Saint Lucia			x
Saint Vincent and the Grenadines	x		x
Samoa*			x
Saudi Arabia			x
Senegal*	x		
Sierra Leone			x
Singapore			
Somalia			
South Africa			
Sri Lanka*	x		
Sudan	x		

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV** PROHB</u>
Suriname	x	x	
Swaziland			x
Syria	x		x
Taiwan (Republic of China)			x
Tanzania	x		x
Thailand			x
Togo	x		
Tonga			
Trinidad and Tobago	x		x
Tunisia	x		x
Turkey			x
Turks and Caicos Islands*			x
Uganda			
Union of Soviet Socialist Republics	x		x
United Arab Emirates			x
United States			
Viet Nam	x		x
Yemen (Arab Republic) [North Yemen]			
Yemen (People's Democratic Republic) [South Yemen]	x		x
Yugoslavia	x		x
Zaire	x		x
Zambia	x		x
Zimbabwe			
Total: 126 countries and territories			

COUNTRIES WHICH HAVE ABOLISHED THE DEATH
PENALTY SINCE 1975

(In recent years, at least one country a year has abolished the death penalty in law or, having done so for ordinary offenses, has gone on to abolish it for all offenses.)

1975: Mexico abolished the death penalty for ordinary offenses.

1976: Canada abolished the death penalty for ordinary offenses.

1976: Portugal abolished the death penalty for all offenses.

1978: Spain abolished the death penalty for ordinary offenses.

Denmark abolished the death penalty for all offenses.

1979: Luxembourg, Nicaragua and Norway abolished the death penalty for all offenses.

Brazil¹ and Fiji abolished the death penalty for ordinary offenses.

1980: Peru abolished the death penalty for ordinary offenses.

¹ Brazil had abolished the death penalty in 1882 but reintroduced it in 1969 while under military rule.

1981: France abolished the death penalty for all offenses.

1982: The Netherlands abolished the death penalty for all offenses.

1983: Cyprus and El Salvador abolished the death penalty for ordinary offenses.

1984: Argentina² and Australia abolished the death penalty for ordinary offenses.

1985: Australia abolished the death penalty for all offenses.

1987: Haiti, the German Democratic Republic, Lichtenstein and the Philippines abolished the death penalty for all offenses.

Moves to reintroduce the death penalty have been defeated in a number of countries in recent years.

² Argentina had abolished the death penalty for all offenses in 1921 and again in 1972 but reintroduced it in 1976 following a military coup.

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HEATH A. WILKINS, Petitioner
- versus -
STATE OF MISSOURI, Respondent

JOSE MARTINEZ HIGH, Petitioner
- versus -
WALTER ZANT, WARDEN, Respondent

On Writs Of Certiorari To The Supreme Court Of
Missouri And United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF AMICI CURIAE FOR RESPONDENTS MISSOURI AND
GEORGIA BY KENTUCKY AND ALABAMA, ARIZONA, ARKANSAS,
CONNECTICUT, FLORIDA, INDIANA, MISSISSIPPI, MONTANA,
NEVADA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA,
SOUTH DAKOTA, VIRGINIA, AND WYOMING

FREDERIC J. COWAN
KENTUCKY ATTORNEY GENERAL

ELIZABETH ANN MYERSCOUGH
ASSISTANT ATTORNEY GENERAL

*DAVID A. SMITH
ASSISTANT ATTORNEY GENERAL
STATE CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601
(502) 564-7600

COUNSEL FOR AMICI CURIAE

*Counsel of Record

6198

Honorable Don Siegelman
Attorney General of Alabama

Honorable Robert K. Corbin
Attorney General of Arizona

Honorable John Steven Clark
Attorney General of Arkansas

Honorable John J. Kelly
Connecticut Chief State's Attorney

Honorable Robert A. Butterworth
Attorney General of Florida

Honorable Linley E. Pearson
Attorney General of Indiana

Honorable Michael C. Moore
Attorney General of Mississippi

Honorable Michael T. Greely
Attorney General of Montana

Honorable Brian McKay
Attorney General of Nevada

Honorable Robert H. Henry
Attorney General of Oklahoma

Honorable LeRoy S. Zimmerman
Attorney General of Pennsylvania

Honorable T. Travis Medlock
Attorney General of South Carolina

Honorable Roger A. Tellinghuisen
Attorney General of South Dakota

Honorable Mary Sue Terry
Attorney General of Virginia

Honorable Joseph B. Meyer
Attorney General of Wyoming

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**INTERESTS OF AMICI CURIAE
IN SUPPORT OF RESPONDENTS,
THE STATES OF GEORGIA AND MISSOURI**

The amici curiae represented here are States having an interest in whether or not the Eighth and Fourteenth Amendments automatically exempt 16 and 17 year old murderers from capital punishment by reason of those killers' age.

Amici submit this brief in support of respondents, the States of Georgia and Missouri, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 35.4.

SUMMARY OF ARGUMENT

The courts below correctly held that the Eighth Amendment does not endow teenaged murderers with an automatic exemption from capital punishment. Wilkins v. State, Mo., 736 S.W.2d 409 (1987); High v. Kemp, 819 F.2d 988 (11th Cir. 1987). To rule otherwise would substantially depart from the longstanding premise of this Court that capital cases must be given individualized consideration. It would also interfere with the

prerogative of State legislatures whose function is to determine public policy concerning crimes and punishments. —

All the States consider the special mitigation of youth in assessing criminal responsibility, but recognize there are many exceptions to the general rule. This commonsense approach is reflected by legislative recognition of an age range in which the presumption of immaturity may be rebutted in a particular case. State legislatures set the maximum age for juvenile court jurisdiction as high as they do to benefit every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By reaching safely beyond the common denominator of chronological immaturity, the States are justified in examining each such offender individually to determine whether an exception should be made in his or her particular case. Doing so tends to avoid the obvious unfairness of exposing virtually indistinguishable killers to vastly different potential punishments.

There is no societal consensus against the execution of 16 and 17 year old murderers. Of the 36 States having the death penalty, 25 authorize that punishment for 16 and 17 year old capital offenders. Even the 14 non-capital States subject killers of this age to their most severe penalties. Thus, 50% of all States expose this age group to capital punishment, 69% of all death penalty States do so, and 78% of all States impose their most severe authorized penalty upon such offenders. A non-capital State's failure to authorize the death penalty for persons of any age cannot reasonably be interpreted as a policy conferring leniency upon teenagers.

Neither would it be logical to assume that any State has unwittingly exposed its juveniles to capital punishment. All the death penalty States have enacted or amended their juvenile jurisdiction transfer statutes after they authorized capital punishment. It is a universal and necessary rule of statutory construction to assume that the legislature is cognizant of its prior enactments.

ARGUMENT

THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT IMMUNIZE 16 and 17 YEAR OLD MURDERERS FROM CAPITAL PUNISHMENT SIMPLY BY REASON OF THEIR CHRONOLOGICAL AGE.

I.

THOMPSON V. OKLAHOMA IS NOT DISPOSITIVE OF THESE CASES

The question at issue is whether or not the legal execution of 16 and 17 year old murderers would, by reason of their birthdates, amount to cruel and unusual punishment per se under the Eighth and Fourteenth Amendments.

In urging the Court to draw a "bright line" exempting all killers under the age of 18 years from capital punishment, petitioners and their amici rely primarily upon Thompson v. Oklahoma, ___ U.S. ___, 108 S.Ct. 2687 (1988)(plurality decision). They attach significance to the fact that all eight of the Justices who sat on the Thompson Court either found (four), or at least expressly assumed (four), the existence of some age limit for the death penalty. Petitioners now contend that the same considerations which led to the result in Thompson should likewise control the decision here.

For various reasons, however, Thompson is not at all dispositive of these cases. First, less than a majority of this Court found that a "national consensus" of any kind exists on the subject of limiting capital punishment according to age. Although the four-Justice plurality in Thompson found the existence of a national consensus on the subject, neither the concurring opinion of Justice O'Connor nor the three-Justice dissent concluded that such agreement on the matter exists among the States.

Thus, less than a majority of this Court actually declared a specific minimum age limit for capital punishment, and in drawing their "bright line" at below age 16 even the plurality expressly left open the question concerning killers above that age:

[Thompson's] counsel and various amici curiae have asked us to "draw a line" that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.

Thompson at 2700 (plurality opinion).

Next, as explained at greater length in Argument V of this brief, those who in Thompson were able to divine a national consensus against the capital punishment of 15 year old murderers will find substantially less evidence to support that conclusion where 16 and 17 year olds are concerned. A significantly larger number of States authorize such legal executions, hence the relatively greater number of 16 and 17 year old killers being sentenced to death by judges and juries throughout the country.

The presumption of a 16 or 17 year old's immaturity is more easily rebutted than that of a younger person who, unlike the petitioners in these cases, is neither emancipated nor stands at the threshold of adulthood.^{1/} The greater ease

1/. Jose High was still living at home (Habeas Corpus 52, 54) but had been traveling across the country to New Jersey and Philadelphia with two fellow criminals whom he considered his subservient "family." (Trial 564, 775, 790). Filed after the granting of certiorari in his case, Georgia's suggestion of mootness raises a serious question as to whether High was even a juvenile when he executed 11 year old Bonnie Bulloch.

with which this presumption may be reliably rebutted arises from common human experience and observation that is reflected by State juvenile transfer statutes. States universally recognize, as well they should, that some individuals of this age deserve to be treated as adults^{2/} while others do not. This is why State legislatures take the precaution of drawing the line for juvenile court jurisdiction at an age high enough to include every offender who might reasonably deserve a presumption of immaturity. Then, having obviously reached beyond the common denominator with such arbitrary line-drawing, States are justified in identifying the true adults among that group and punishing them as such on a case-by-case basis.

Petitioners also seek support from Justice O'Connor's concurring opinion in Thompson, attempting to characterize it as a view that any capital sentencing statute is invalid for want of

2/. So does this Court. See, e.g., Fare v. Michael C., 442 U.S. 707, 734, n.4 (1979)(Justice Powell dissenting); Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

specificity unless the particular provision itself sets an age limit.^{3/} They would interpret Justice O'Connor's opinion as a constitutionally required format for arranging the provisions of each State penal code.

Respondents' amici do not view the Thompson concurrence quite so simplistically. The concern expressed by Justice O'Connor was not how a State manifests its intention to capitally punish 15 year old murderers. Rather, her concern was whether the State had actually intended to do so:

Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old

^{3/}. Carried to its logical conclusion, the petitioners' interpretation of the Thompson concurrence would uphold the specified execution of a 16 year old while at the same time invalidating the unspecified execution of a 17 year old killer.

defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.

Thompson at 2710-2711 (concurring opinion), (emphasis added).

Absent "the earmarks of careful consideration", Justice O'Connor chose to err on the side of caution in "this unique situation." Id. at 2711. Such reasoning presumably would not apply where a State in one way or another has demonstrated that it considered a minimum age for capital punishment. As detailed in Argument III of this brief, neither should such a result obtain where it may safely be assumed that the legislature was cognizant of the death penalty statute's reach.

II.

**PUNISHMENT IS A QUESTION OF LEGISLATIVE
POLICY AND ANY EIGHTH AMENDMENT
ANALYSIS MUST GIVE APPROPRIATE
DEFERENCE TO THE LEGISLATURE.**

The plurality, concurring, and dissenting opinions in Thompson all agree that views of society and contemporary moral standards are reflected by the enactments of legislative

bodies.

It will rarely if ever be the case that the members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

Thompson at 2715 (Justice Scalia dissenting).

Twenty-five States^{4/} authorize the execution of 16 and 17 year old murderers. In order to accept petitioners' argument that evolving standards of decency proscribe execution of any person under 18, the standards of decency as evidenced by the legislative enactments of half of these United States must flatly be rejected.

4/. Ala.Code §12-15-34(a); Ariz.Rev.Stat. Ann. §8-202 and Ariz.Rules of Proc. for Juvenile Court 12 & 14; Ark.Code Ann. §§5-1-116(b) & 5-10-101; 10 Del.Code Ann. §938(a)(1) and 11 Del.Code Ann. §§636 & 4209; Fla.St. Ann. §39.02(5)(c)(1); Ga.Code Ann. §17-9-3; Idaho Code §16-1806(1)(a); Ind.Code Ann. §35-50-2-3(b); Ky.Rev.Stat. §640.040(1); La.Rev.Stat. Ann. §§14:30 & 13:1570(A)(5); Miss.Code Ann. §43-21-151 (3); Mo.Rev.Stat. §211.071.1; Mont.Code Ann. §41-5-206(1)(a)(i) & §45-5-102; Nev.Rev.Stat. §176.025; N.H.Rev.Stat. Ann. §§21-B:1, 630.1(v) and 630.5(X111); N.C.Gen.Stat. §74-608 & 13-17; 10 Okla.Stat. Ann. §1104.2 & 1112(b); 42 Pa.Cons.Stat. Ann. §§6322(a)(1978), 6355(a)(2); S.C.Code Ann. §20-7-430(6); S.D. Codified Laws Ann. §§26-8-7 & 26-11-4; Tex.Penal Code Ann. §8.07(d); Utah Code Ann. 78-3a-25(1); Va. Code Ann. §16.1-269(A); Wash.Rev.Code §9A.32.030(2), 10:95.020 & 13.40.110(1)(a); Wyo.Stat. §14-6-237.

The deference we owe to the decisions of the state legislature under our federal system [citation omitted] is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." [citations omitted].

Gregg v. Georgia, 428 U.S. 153, 177 (1976).

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 176.

If petitioners' bright-line standard is adopted, this "heavy burden" is ignored.

III.

IT IS UNIVERSALLY AND NECESSARILY PRESUMED THAT LEGISLATURES ARE AWARE OF THEIR OTHER ENACTMENTS, AND OF THE PRIOR INTERPRETATIONS GIVEN TO SUCH STATUTES, WHEN ENACTING A SUBSEQUENT STATUTE.

Contrary to the assertions of the petitioners, these cases do not turn on the organizational structure of the States' capital

sentencing schemes. While their chief contention is that juveniles are invariably too immature for capital punishment despite any and all countervailing indicia, they alternatively posit the one-Justice Thompson concurrence as prescribing the only constitutional means by which a juvenile death penalty statute may be enacted. According to the petitioners and their amici, juveniles cannot be subjected to the death penalty unless the capital sentencing statute itself specifies a minimum age. Otherwise, they claim, by setting the minimum age in a separate juvenile waiver statute without mentioning it again in the capital sentencing provision, the legislature might not realize that such youthful killers would be subject to the death penalty.

The fallacy of such reasoning is self-evident. Some State legislatures, for example, have arranged their penal codes so that crimes are defined in one chapter while the various penalties and defenses therefor are provided in another. Presumably, not even the petitioners would seriously allege that such an

organizational format renders the entire penal code invalid for failure of one provision to specifically refer to another.

It is always appropriate to assume that our elected representatives, like other citizens, know the law. . . we are especially justified in presuming both that those representatives were aware of the prior interpretation. . . and that their interpretation reflects their intent. . . .

Cannon v. University of Chicago, 441 U.S. 677, 696-698 (1979). See also, e.g., Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 319 (1983); Shapiro v. United States, 335 U.S. 1, 16 (1947); Lewis v. United States, 445 U.S. 55, 61-64 (1980); Roche Products v. Bolar Pharmaceutical Co., 733 F.2d 858 (D.C. Cir. 1984); Florida Nat. Guard v. Federal Labor Rel. Authority, 699 F.2d 1082 (11th Cir. 1983); Martin v. Luther, 689 F.2d 109 (7th Cir. 1982); United States v. Professional Air Traffic Controllers, 653 F.2d 1134 (7th Cir. 1981); Air Transport, Etc. v. Profess. Air Traffic, Etc., 667 F.2d 316 (2nd Cir. 1981); Anderson Seafoods, Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982); Anderson v. Black & Decker, 597

F.Supp. 1298 (E.D. Ky. 1984); Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984); In re Misener, 213 Cal.Rptr. 569, 38 C.3d 543, 698 P.2d 637 (1985); Ingram v. Cooper, Colo., 698 P.2d 1314 (1985); State v. Dupree, 196 Conn. 655, 495 A.2d 691 (1985); Giuricich v. Emtrol Corp., Del., 449 A.2d 232 (1982); State v. Dunmann, Fla., 427 So.2d 166 (1983); Leonard v. Benjamin, 253 Ga. 718, 324 S.E.2d 185 (1985); Marsland v. Pang, 5 Hawaii App. 463, 701 P.2d 175 (1985); People v. Palmer, 84 Ill.Dec. 658, 104 Ill.2d 340, 472 N.E.2d 795 (1984); Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc., Ky., 690 S.W.2d 393 (1985); Bunch v. Town of St. Francisville, La.App., 446 So.2d 1357 (1984); Mayor and City Council of Baltimore v. Hackley, 300 Md. 277, 477 A.2d 1174 (1984); People v. Smith, Mich., 378 N.W.2d 384 (1985); Kilowatt Organization (TKO), Inc. v. Dept. of Energy, Planning and Development, Minn., 336 N.W.2d 529 (1983); Holt v. Burlington Northern R. Co., Mo.App., 685 S.W.2d 851 (1984); Thiel v. Taurus Drilling Ltd., Mont., 710 P.2d 33 (1985); Douglas County v. State, 210 Neb. 762, 316 N.W.2d

767 (1982); Boulder City v. General Sales Drivers, etc., 101 Nev. 117, 694 P.2d 498 (1985); Mahwah Tp. v. Bergen County Bd. of Taxation, 98 N.J. 268, 486 A.2d 818 (1985); Garrison v. Safeway Stores, 102 N.M. 179, 692 P.2d 1328 (1984); Arbegast v. Board of Ed. of South New Berlin Cent. School, 490 N.Y.S.2d 751, 65 N.Y.2d 161, 480 N.E.2d 365 (1985); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Clark, N.D., 367 N.W.2d 168 (1985); Commonwealth v. Milano, 300 Pa. Super. 251, 446 A.2d 325 (1982); State v. Feiok, S.D., 364 N.W.2d 536 (1985); Brown-Forman Distillers Corp. v. Olsen, Tenn.App., 676 S.W.2d 567 (1984); Driscoll v. Harris County Com'rs. Court, Tex.App., 688 S.W.2d 569 (1985); Murray City v. Hall, Utah, 663 P.2d 1314 (1983); State v. Peterson, 100 Wash.2d 788, 674 P.2d 1251 (1984); Pullano v. City of Bluefield, W.Va., 342 S.E.2d 164 (1986); In Interest of P., 119 Wisc.2d 349, 349 N.W.2d 743 (1984); Capwell v. State, Wyo., 686 P.2d 1148 (1984).

Carried to its logical conclusion, the petitioners' interpretation of the Thompson

concurrence would exempt juvenile murderers from non-capital punishments as well as from the death penalty. According to their analysis, a teenaged killer could not even be sentenced to life in prison unless the homicide statute itself specified a minimum age limit. Such an approach is neither reasonable nor required by the Eighth Amendment.

It would be unrealistic to conclude from statutory format alone that a State has failed to appreciate or seriously consider the scope of its death penalty law. Indeed, all 36 of the death penalty States^{5/} have either passed or amended in some manner their juvenile waiver statutes after they authorized capital punishment: Ala.Code §12-15-34(a)(Repl.1982); Ariz.Rev.Stat.Ann. §8-202 (1974), Ariz. R.P. Juv.Ct. 12, 14; Ark. Code Ann.

5/. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming.

§§885-1-116(b), 5-10-101 (1987); Cal. Pen. Code §190.5
(1988); Col. Rev. Stat. §16-11-103 (1)(a) (Repl. 1986);
Conn. Gen. Stat. Ann. §53a-46a(g)(1) (1987); 10
Del. Code Ann. §938(a)(1) (1975), 11 Del. Code Ann.
§§636, 4209 (Repl. 1987); Ga. Code Ann. §17-9-3
(1982); Fla. Stat. Ann. §39.02(5)(c)(1) (Supp. 1988);
Idaho Code §816-1806 (1)(a) (Supp. 1988); 38
Ill. Ann. Stat. §9-1(b) (Supp. 1988); Ind. Code Ann. §
35-50-2-3(b) (Supp. 1988); Ky. Rev. Stat.
§640.040(1) (Supp. 1987); La. Rev. Stat. Ann. §§614.30,
13:1570(A)(5) (1986); 27 Md. Code §412(f) (Repl.
1988); Miss. Code Ann. §43-21-151(3) (Supp. 1987);
Mo. Rev. Stat. §211.071.1 (1986); Mont. Code Ann.
§§41-5.206(1)(a)(i), 45-5-102 (1987); Nebr. Rev.
Stat. §28-105.01 (1985); Nev. Rev. Stat. §176.025
(1987); N.H. Rev. Stat. Ann. §§21-B:1, 630.1 (V),
630.5 (XIII) (1986, Supp. 1987); N.J. Stat. Ann.
§§2A:4A-22(a), 2C:11-3(g) (Repl. 1987, Supp. 1988);
N.M. Stat. Ann. §§28-6-1(A), 31-18-14(A) (Repl.
1987); N.C. Gen. Stat. §§74-608, 14-17 (Supp. 1987);
Ohio Rev. Code Ann. §2929.02(A) (1986); 10 Okla.
Stat. Ann. §§1104.2, 1112(b) (1987); Ore. Rev. Stat.
§§161.620, 419.476(1) (1987); 42 Pa. Cons. Stat. Ann.

§6322(a)(1978) & §6355(a)(1)(1982); S.C. Code Ann. §20-7-430(6)(1985); S.D. Cod.L. Ann. §§26-8-7, 26-11-4 (1984); Tenn. Code Ann. §§37-1-102(3), 37-1-134(a)(1); Tex. Pen. Code Ann. §8.07(d)(Supp. 1988); Utah Code Ann. §78-3A-25(1)(1987); Va. Code Ann. §16.1-269(A)(Repl. 1988); Wash. Rev. Code §§9A.32.030(2), 10.95.020, 13.40.110(1)(a)(1988, Supp. 1988); Wyo. Stat. §14-6-237 (1986).

It is a necessary rule of statutory construction to assume that one legislative hand knows what the other has done, and this is an especially safe assumption given the relative timing of the enactments and revisions at issue here. In view of all the foregoing, it would be less than credible to assert that any State has unwittingly exposed youthful murderers to capital punishment.

IV.

THE LAWS OF NON-DEATH PENALTY STATES SHOULD BE COUNTED AS SUPPORTIVE OF RESPONDENTS, RATHER THAN PETITIONERS, IN DECIDING WHETHER A NATIONAL CONSENSUS EXISTS ON THE PUNISHMENT OF JUVENILE MURDERERS.

Fourteen States adopt a minority position that capital punishment should never be inflicted

upon persons of any age. Consequently, the Thompson plurality did not consider any of the laws of these 14 States as holding 15, 16, and 17 year olds culpable and accountable for the crime of murder. Respondents' amici believe such examination is necessary. It refutes the theory there is a societal consensus that 15, 16 and 17 year olds are categorically less accountable for their acts and should therefore be excluded from imposition of a State's most severe punishment for its most severe violent crime - murder.

The 14 non-capital States either have no juvenile court jurisdiction over 16 and 17 year olds or can waive them to be tried as adults for the crime of murder. All 14 allow imposition of the maximum penalty for murder against persons of those ages.

1). Alaska has no age limitation restricting waiver and transfer of individuals less than 18 years to criminal court. Alaska Stat. §410.060. Any person waived to stand trial as an adult is subject to the maximum punishment of imprisonment for 99 years. Alaska Stat. §12:55:125.

2). Hawaii permits transfer of a person 16 or 17 years old to criminal court upon waiver of jurisdiction by the family court after a hearing. HRS §571-22. The maximum punishment carries a penalty of life imprisonment without possibility of parole subject to commutation after twenty years to life imprisonment with parole. HRS §706-656.

3. Iowa allows waiver of any individual between 14 and 18 years old. A person waived from juvenile court is subject to the maximum penalty of life in prison. 37 ICA §902.1.

4). Kansas permits 16 and 17 year olds to be waived to adult criminal court. Certain categories of 16 year olds are exempt from juvenile court jurisdiction and subject to prosecution as an adult. Kan.Stat.Ann. §§21-3611, 38-1602(b)(3)(4)(6); 38-1604(a). There is no restriction for imposing the maximum penalty of life in prison on this class of individuals. Kan.Stat.Ann. 45-21-4501(a).

5). Maine has no age limitation in its waiver statute. Chapter 503, Title 15-3101. A

sentence of life in prison is the maximum penalty which may be imposed. Chapter 51, Title 17A-1152.

6). Massachusetts juvenile courts have no jurisdiction over 17 year olds. Mass.Gen.Laws Ann. 119 §21. Fourteen, 15 and 16 year olds may be waived to adult criminal courts. Id. The maximum penalty which may be imposed is life imprisonment. Id. 265 §2.

7). Michigan treats 17 year olds as adults with juvenile courts having concurrent jurisdiction of offenders between 17 and 18 years of age and charged with certain enumerated offenses or conduct. Mich.Laws Ann. §712A.2(d). Waiver is allowed for individuals age 15 and 16 charged with committing felonies. Id. 712A.4(1). The maximum penalty is life imprisonment. Id. 750.316.

8). Minnesota permits waiver of individuals aged 14, 15, 16 and 17. Waiver is mandatory in certain cases and a prima facie case of nonamenability to treatment within the juvenile court system is considered established if the individual is charged with certain enumerated

offenses. Minn.Stat.Ann. §260.125(1)(3)(3a). The maximum period of incarceration is life. §609.10.

9). New York juvenile courts have no jurisdiction over any individual older than 16. Juvenile court jurisdiction is also excluded for individuals aged 13 or older charged with second degree murder and individuals 14 and older charged with second degree murder or other enumerated violent crimes. N.Y.Fam.Ct.Act §301.2(1)(b) (McKinney 1983); N.Y. Penal Law §§10(18), 30(2) (McKinney Supp. 1987); N.Y.Crim.Pro.Law §§180.75, 190.71, 210.43, 220.10(5)(g) (McKinney 1982 and Supp. 1987). The maximum penalty for a juvenile offender (under 16) is life with an indeterminate sentence of a minimum of not less than 5 years but not to exceed 9 years and a maximum of at least 3 years. CLS, Penal Law §70.05.

10). North Dakota allows persons 14, 15, 16 and 17 to stand trial as adults after a waiver hearing. In the case of 14 and 15 year olds the charged offense must involve infliction or threat of serious bodily harm. Sixteen and 17 year olds may request waiver and transfer. N.D. Cont.Code

§27-20-34(1). The maximum punishment is life without eligibility for parole for 30 years, less sentence reduction for good conduct. N.D. Cont. Code §2.1-32.01.

11). Rhode Island permits waiver of 16 and 17 year olds charged with indictable offenses. R.I. Gen.Laws Ann. §14-1-7. The maximum penalty for murder is life without eligibility for parole. R.I. Gen. Laws Ann. §§11-23-2, 12-19.2-1.

12). West Virginia permits waiver from juvenile court of any person charged with murder regardless of age. W.Va. Code Ann. §49-5-10(c)(d). The maximum sentence is life without parole unless the jury recommends mercy. W.V. Code Ann. §62-3-15.

13). Wisconsin allows persons 16 and 17 to be waived from juvenile court jurisdiction to stand trial as adults. The maximum penalty for first degree murder is life in prison. Wisc. Code §§939.50(3)(a), 940.01.

14). Vermont has no juvenile court jurisdiction of delinquents over 16. Vt.Stat.Ann. Title 33 §632(a)(1). Waiver is allowed for

individuals 10 years of age but less than 14 for murder and other enumerated crimes. Id. Title 33, §635A(a). Juvenile courts have no jurisdiction over persons 14 and 15 charged with murder or certain other crimes unless the case is transferred from criminal court to juvenile court. The maximum penalty for murder in the first degree is life imprisonment for a minimum term of 35 years; with a finding of mitigation, for a minimum of not less than 15 years; up to and including life without parole. T.123 §2303(a).

The plurality and concurring opinions in Thompson assume that the 14 States which do not impose capital punishment contribute to a societal consensus that the death penalty is inappropriate for 15 year olds. These States proscribe the death penalty for all persons regardless of age. These States reflect a minority view. Even though these States prohibit capital punishment, all 14 recognize that some young offenders should be treated as adults in terms of culpability and accountability for crimes they commit. Once the determination is made that teenaged offenders

should be tried as adults and held responsible for their violent acts, no limitation is placed on the maximum penalty which may be imposed. They are to be treated as any other adult criminal. The juvenile justice system no longer affords them protection from punishment merely because of age. The societal consensus of all 14 non-capital States is that 16 and 17 year olds^{6/}, by reason of age alone or the serious nature of the offense or other considerations determined by waiver hearings, should be subject to the most severe punishment authorized by their statutes. There is no consensus among these 14 States that 16 and 17 year olds should not suffer maximum penalties. The consensus shows the contrary.

V.

**NO SOCIETAL CONSENSUS EXISTS THAT 16
AND 17 YEAR OLDS SHOULD BE EXEMPTED
FROM TO THE DEATH PENALTY.**

Among the 36 States which endorse capital punishment, there is no consensus of a minimum age

6/. Since execution of persons committing capital crimes when age 16 or 17 is before the Court, ages younger than 16 are not discussed.

at which defendants may be sentenced to death. Seven States, Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina and Wyoming, have no age limitation. South Dakota specifies a minimum age of 10 years. Montana specifies age 12; Mississippi age 13; Alabama, Idaho, Missouri, North Carolina, and Utah age 14. Arkansas, Louisiana and Virginia have a minimum age limitation of 15. Indiana, Kentucky, Nevada and Washington limit execution to individuals age 16 or older. Georgia, New Hampshire and Texas specify a minimum age limitation of 17. California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Oregon and Tennessee draw the line at 18 years of age. (See footnote 4.)

There is no broad agreement among the States at what age capital punishment can be imposed. Since no societal consensus can be discerned from legislative enactments, no bright-line should be drawn prohibiting the death penalty for any person under 18 years of age.

Analysis of jury deliberations and verdicts affords no evidence of consensus as to the

appropriateness of executing 16 and 17 year old murderers. Petitioners and their amici assume that since few 16 and 17 year olds have received the death penalty or been executed, it must mean there is a general abhorrence throughout society of inflicting the death penalty on persons of those ages. Petitioners' proposition fails to account for the realities of the juvenile justice system.

The Office of Juvenile Justice and Delinquency Prevention recently commissioned a research, test and demonstration study (The Juvenile Serious Habitual Offender/Drug Involved Program) which focused on serious, chronic, violent juvenile offenders.

The SHO/DI program found that most juvenile delinquents:

" . . . do not even make it into court. Rather, they are diverted out of the juvenile justice system, early in the process, often before they ever get to court. According to Paul Strasburg:^{7/} Between 80 and 90 percent of arrested children are diverted or dropped from the judicial

^{7/}. Strasburg is the author of Violent Delinquents, A Report to The Ford Foundation.

process with little or no supervision. Half are diverted by the police themselves. And up to two-thirds of the cases left may be withdrawn, dismissed, or adjourned in contemplation of dismissal."^{8/}

Data analysis obtained during the program revealed that the "serious juvenile population is very, very small. Overall, they represent less than one percent of the entire juvenile population."^{9/}

The fallacy of Petitioners' reliance on jury verdicts and the conclusions drawn therefrom become apparent when other factors such as the following are considered:

- 1). The relatively small number of violent juvenile offenders.

- 2). The disproportionate number of juveniles diverted or never brought into the juvenile justice system, much less the criminal system.

8/. Juvenile & Family Court Journal, 1986, Vol. 37, No. 5, p.28. "Chronic Serious Juvenile Offenders", Wolfgang Pindur, Ph.D., and Donna K. Wells. (Pindur is the National Field Manager of the SHO/DI Program; Wells is also associated with the program.)

9/. Id. at 28.

3). The safeguard of waiver hearings by juvenile courts before transfer of offenders to criminal court.

4). The fact that several States have no death penalty at all.

5). The consideration by juries of the mitigating factor of the defendant's youth.

The fact there are few jury verdicts sentencing 16 and 17 year olds to death does not indicate a consensus against such penalties. All indicators suggest instead that there are few opportunities to even consider them.

The violence of chronic youthful offenders is recognized as the major problem confronting the juvenile justice system.^{10/} The National Council of Family Court Judges attempted to address this problem by endorsing 38 recommendations. Among the

^{10/}. Juvenile & Family Court Journal, 1985, Vol.36, No.2, pp. 27-28, "The Juvenile & Serious Habitual Offender/Drug Involved Program: A Means To Implement Recommendations Of The National Council Of Juvenile & Family Court Judges" by Wolfgang Pindur, Ph.D., and Donna K. Wells commenting on the March 1984 report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC).

various recommendations, two are particularly relevant to the issue presented to this Court.

"Recommendation #1: Serious Juvenile Offenders Should Be Held Accountable By The Courts. The primary focus of the juvenile court for the disposition of serious chronic or violent juvenile offenders should be accountability. Dispositions of such offenders should be proportionate to the injury done and the culpability of the juvenile and to the prior record of adjudication if any.

'In conjunction with this recommendation, the Council acknowledges that "the principal purpose of the juvenile justice court system is to protect the public.'" 11/

"Recommendation #13: Offenders Unamenable To Juvenile Treatment Should Be Transferred. The judges note that "there are juveniles for whom the resources and processes available to the juvenile court will serve neither to rehabilitate the juvenile nor to protect the public."

Juvenile court judges face the problem of violent youths every day. These recommendations acknowledge actual experience and observation that persons of any age engaging in violence should and must be held accountable for their actions. By

11/. Id. at 31.

their acts, some youths have placed themselves beyond the pale of treatment recognized as appropriate for other individuals of their age group. The remedy left to society at this point is to treat these anomalies of the juvenile justice system as it would any other violent offender. The individual violent youth's culpability and society's expectations of accountability demand nothing less.

The Council's recommendations do not include a call for abolition of the death penalty for youths. This non-recommendation becomes conspicuous by its absence. It must be assumed that juvenile court judges are aware that once a juvenile is transferred to stand trial on murder charges as an adult, the State may impose its maximum penalty. In 25 States, this includes the possibility of death for persons less than 18 years of age. The Council's silence on this question lends support to amici's position that no national consensus exists condemning the death penalty for persons under 18 years old.

VI.

**THE INTERNATIONAL TREATIES RELIED UPON BY
THE PETITIONERS AND THEIR AMICI HAVE NO
APPLICATION WHATSOEVER IN THESE CASES.**

The petitioner and several of their amici¹² claim that international treaties, three in particular, require this Court to exempt 16 and 17 year old murderers from capital punishment aside from Eighth Amendment grounds.

Such contentions are not fairly included in the question for which certiorari was granted, i.e., whether the Eighth and Fourteenth Amendments to the United States Constitution forbid capital punishment of such killers. See United States Supreme Court Rule 21.1(a); See also Buchanan v. Kentucky, 483 U.S. ___, 107 S.Ct. 2906, 2908, n. 1 (1987), refusing to consider claims extraneous to the questions for which certiorari had been granted.

Two of the treaties relied upon by the petitioners' amici are the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. Neither has been

¹²/. Amnesty International, Defense For Children International, and International Human Rights Law Group.

ratified by the United States. The third treaty they cite is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Although the United States has ratified that pact, it applies only during war and even then does not prevent any country from executing its own citizens. See 6 U.S.T. 3516, 3520, 3522.

VII.

THE LAWS AND CUSTOMS OF FOREIGN COUNTRIES ARE IRRELEVANT TO THE QUESTION OF WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROHIBIT CAPITAL PUNISHMENT OF JUVENILE MURDERERS.

The most unreliable consideration asserted by the petitioners and their amici is that which concerns the laws and customs of foreign countries. Although the Thompson plurality relied upon the position taken by Western European and other Anglo-American nations^{13/}, closer inspection reveals that 19 of those 22 countries have no death penalty at all for "ordinary crimes" (except

^{13/}. Respondent's list of these countries would consist of Australia, Austria, Belgium, Canada, Denmark, Finland, France, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweeden, Switzerland, the United Kingdom and West Germany.

wartime offenses or under circumstances not at issue here). See Amicus Curiae Brief For Amnesty International, A1-A7. The other three such nations have not executed a criminal for at least 10 years. Id. If these figures were extrapolated to the United States, one would expect nationwide opposition to the imposition of capital punishment for any "ordinary" homicide. In fact, precisely the opposite is true. Tison v. Arizona, 483 U.S. ___, 107 S.Ct. 1676 (1987); Gregg v. Georgia, supra.

The unreliability of such cross-national comparisons is attributable to not only the substantial differences in culture and heritage, but to the very nature of crime in other countries. According to available information, the per capita homicide rate in the United States would appear to be from two to 10 times that of virtually all of the nations discussed above.^{14/} It cannot reasonably.

^{14/}. Landau, "Trends in Violence and Aggression: A Cross Cultural Analysis," 22 *Annales Internationales de Criminologie* (International Annals of Criminology) 119, 130-131 (1984); Wolfgang and Zahn, "Homicide: Behavioral Aspects," 2 *Encyclopedia of Criminal Justice* 848, 850-851 (1983).

be said that this fact is insignificant in forming the attitudes of other countries with regard to capital punishment, or that the same judgment would be made if these nations had a comparable homicide rate. An additional difficulty of this kind arises with particular regard to the present issue of murders by juveniles. It has never been shown that comparable problems exist in other countries, and in fact there is evidence to the contrary.^{15/} Since independent and reliable evidence exists which establishes a consensus in the United States allowing the execution of 16 year olds who commit a capital homicide, no need arises to examine the positions taken by other countries on the basis of their own national experiences.

^{15/}. "[I]n contrast to the pattern in the United States, the increase in crime found so prominently among the young people in Europe seems to have been concentrated among young adults between eighteen to twenty-five years of age instead of youths under eighteen." Ferdinand, "Crime Statistics: Historical Trends in Western Society," 1 Encyclopedia of Criminal Justice 392, 399 (1983).

VIII.

THE DELUGE OF ANTI-DEATH PENALTY BRIEFS FILED BY PETITIONERS' AMICI IS NOT A RELIABLE INDICATOR OF NATIONAL CONSENSUS ON THE PARTICULAR ISSUE PRESENTED HERE.

In a concerted and well organized effort to persuade this Court, which they are entitled to do, 34 different organizations have filed or joined amici curiae briefs on behalf of the petitioners. These groups^{16/} largely oppose capital punishment

^{16/}. West Virginia Council of Churches, The American Baptist Churches, The American Friends Service Committee, The American Jewish Committee, The American Jewish Congress, The Christian Church (Disciples of Christ), The Mennonite Central Committee; The General Conference Mennonite Church; The National Council of Churches, James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church, The Southern Christian Leadership Conference, The Union of American Hebrew Congregations, The United Church of Christ Commission for Racial Justice, The United Methodist Church General Board of Church and Society, The United States Catholic Conference, Amnesty International, Defense For Children International, International Human Rights Law Group, National Legal Aid And Defender Association, National Association of Criminal Defense Lawyers, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, and the American Bar Association.

under any conceivable circumstances.^{17/} Several of these organizations are already suggesting that the "bright line" should be drawn beyond the age of 18. E.g., the American Society for Adolescent Psychiatry, the American Orthopsychiatric Association (at 4, 5, n.5), the National Legal Aid And Defender Association, the National Association of Criminal Defense Lawyers (at 28, n.13), the Defense for Children International (at 58-59, n.71), the West Virginia Council of Churches (at 12).

If this Court were making a legislative judgment as to whether those who commit a capital homicide at age 16 should be eligible for the death penalty, the views of "respected professional organizations" might well be relevant, both as arguments on the merits of the proposed legislation and as an expression on the part of the small segment of society which such groups represent. The views of these individual interest groups, however,

^{17/}. A notable exception is the American Bar Association, which five times in its amicus brief disclaims any general opposition to the death penalty. Id. at 2, 3, 5, 8 and 11.

are not reliable "objective factors" in judging whether a national consensus exists against the execution of 16 and 17 year old killers. By definition, positions taken on behalf of a particular organization at most represent the opinion of its members, not society as a whole. Since no need exists for those entities which approve an existing practice to formally state that fact, resolutions of this character inevitably represent the voices in opposition. Consequently, Georgia and Missouri do not attempt to inundate this Court with amici curiae briefs by the countless victims rights groups which more accurately reflect societal consensus.

As this Court has acknowledged, it is not designed or intended to reflect the views of society, as are legislative or other representative bodies. Gregg v. Georgia, supra, 428 U.S. at 175-176. In paying heed to these groups which have gone to the effort of expressing formal opposition on the present issue, there is a considerable risk of mistaking the clamor of organized protest for a settled national consensus.

IX.

THIS COURT SHOULD NO MORE DRAW A "BRIGHT LINE" FOR CAPITAL PUNISHMENT INELIGIBILITY THAN PRESCRIBE A UNIFORM AGE RANGE FOR JUVENILE JURISDICTION, PROHIBIT TRANSFER THEREFROM, OR RIGIDLY DEFINE THE CIRCUMSTANCES UNDER WHICH INDIVIDUAL EXCEPTIONS THERETO COULD BE MADE.

A ruling by this Court that juveniles are invariably too immature for capital punishment would establish precedent for exempting them from lesser penalties on the same ground.

At least for the time being, the petitioners and their amici do not challenge the prerogative of State legislatures to establish various age ranges for juvenile court jurisdiction. Neither do they, as yet, argue that the transfer of individual offenders from juvenile court for trial as adults is constitutionally prohibited. And although Kent v. United States, 383 U.S. 541, 557 (1966) extends minimum Due Process standards to juvenile transfer proceedings, not even the defense bar suggests that the Court should prescribe the criteria for determining whether a particular offender deserves to be treated as an adult.

State legislatures set the maximum age for juvenile jurisdiction as high as they do to benefit

every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By using this approach to reach beyond the common denominator of chronological immaturity, the States are justified in examining each juvenile individually to determine whether an exception should be made in his or her particular case. As the Court has emphasized on prior occasions, maturity and sophistication are factors which vary from individual to individual, so chronological age is only one of the various circumstances that should be taken into account.

Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully "street wise", hardened criminals deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In Re Gault, 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have.

Fare v. Michael C., supra, 442 U.S. at 734, n.4.

All the States recognize the special mitigation of youth in their juvenile transfer proceedings long before they do so, again, in capital sentencing trials. Consequently, there is no more reason for this Court to draw a "bright line" age requirement for capital punishment than there is for it to do so in the context of juvenile jurisdiction waiver proceedings. In both situations that decision is better left to the individual States whose legislative determinations, for the sake of comity, should be accorded deference by the federal judiciary.

X.

**THE APPROPRIATENESS OF A DEATH SENTENCE
SHOULD CONTINUE TO BE DETERMINED ON AN
INDIVIDUAL BASIS.**

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'
California v. Brown, 479 U.S. 538, ___ 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)." Thompson at 2698.

Guided, individualized consideration of the offender's character and the circumstances of his

crime is the touchstone of capital sentencing. See Zant v. Stephens, 462 U.S. 862, 879 (1983), collecting cases. Gregg v. Georgia, 428 U.S. 153 (1976) and its progeny are intended to avoid the kind of "rigid", "mechanical" and "wholly arbitrary" determination urged here by the petitioners. Barclay v. Florida, 463 U.S. 939, 950 (1983). No particular circumstance of a capital offender's crime should automatically require the death penalty. Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976), or automatically foreclose it, Tison v. Arizona, supra. Rather, the sentencer must be "free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008 (1983). Youthfulness is only one such factor and it is not necessarily the most important.

Maturity varies from individual to individual. Some individuals never attain it; some do at an age labeled "child." "Some of the older minors become fully 'street wise' hardened

criminals, deserving no greater consideration than that properly afforded all persons suspected of crime." Fare v. Michael C., supra, 442 U.S. at 734, n.4.

The need for individual consideration of the defendant's character and the circumstances of the crime becomes glaringly apparent now that a question of High's true age has been raised. Has High suddenly become more deserving of the death penalty as a 19 year old murderer, or less deserving of death penalty as a 17 year old murderer? Neither the circumstances of the crime nor the defendant's character at the time he committed the crime have changed. There is no reason relating to the crime or the defendant which should preclude the death penalty for High. To draw a bright-line rule prohibiting execution of anyone less than 18 years of age, and thus prohibiting High's execution if Georgia cannot establish his age at 19, undermines the very purpose of individualized sentencing of offenders, which is to fashion a sentence appropriate to the crime.

XI.

SIXTEEN AND 17 YEAR OLD CRIMINALS WHO ARE TRIED AS ADULTS RECEIVE THE BENEFIT OF INDIVIDUALIZED CONSIDERATION TWICE, WHEN TRANSFERRED FROM THE JUVENILE COURT AND AGAIN WHEN THEY ARE TRIED AS ADULTS.

No national policy of automatic exemption for 16 and 17 year olds from the death penalty exists. For those 16 and 17 year olds subject to juvenile court jurisdiction, waiver proceedings provide individual consideration of whether the offender can best be served by the juvenile or criminal justice system. Kent v. United States, supra, 383 U.S. at 557 requires a hearing, assistance of counsel and a statement of reasons for the transfer. These minimum Due Process rights provide additional safeguards that offenders with presumptive juvenile status will not be arbitrarily reclassified as adults.

In all States where 16 or 17 year olds are eligible for the death penalty, their youth must be presented as a mitigating factor to the sentencer. Eddings v. Oklahoma, 455 U.S. 104 (1982).

Twenty-nine States^{18/} have adopted the holding of Eddings through legislation designating the defendant's age as a mitigating factor in capital cases.

In every trial where death is a possible penalty, a 16 or 17 year old will be accorded consideration of his youth in the assessment of punishment. Age alone should not exclude a punishment otherwise deemed appropriate considering the defendant's character and criminal act.

18/. Ala.Code §13A-5-51(7) (Repl.1982); Ariz.Rev. Stat. Ann. §13-703(G)(5)(Supp. 1987); Ark.Code Ann. §5-4-605(4)(1987); Cal.Penal Code §190.05(h)(9)(West 1988); Col.Rev.Stat. §16-11-103(5)(a)(Repl.1986); Conn.Gen.Stat. Ann. §53a-46(a)(g)(1)(1987); Fla.Stat. Ann. §921.141(6)(g)(1985); Ind.Code Ann. §35-50-2-9(c)(7)(Cum.Supp.1988); Ky.Rev.Stat. Ann. §532.025(2)(b)(8)(Cum.Supp. 1988); La.Code Crim. Proc., art. 905.5(f)(1984); 27 Md.Code §413(g)(5)(Repl.1988); Miss.Code Ann. §99-19-101(6)(g)(Cum.Supp. 1987); Mo.Rev.Stat. §565.032.3(7)(1986); Mont.Code Ann. §46-18-304(7)(1987); Nebr.Rev.Stat. §29-2523(2)(d)(1985); Nev.Rev. Stat. §200.035.6 (1987); N.H.Rev.Stat. Ann. §630.5(11)(b)(5)(1986); N.J.Stat. Ann. §2C:11-3(c)(5)(c)(Supp. 1988); N.M.Stat. Ann. §31-20A-6(1)(Repl.1987); N.C. Gen.Stat. §16A-2000(f)(7)(Supp. 1987); Ohio Rev.Code Ann. §2929.04(B)(4)(1986); Ore.Rev.Stat. §163.150(1)(b)(B)(Supp. 1988); 42 Pa.Cons.Stat. Ann. §9711(e)(4)(Supp.1987); S.C.Code Ann. §16-3-20(C)(b)(7,9)(Supp.1987); Tenn.Code Ann. §32-2-203(j)(7)(1982); Utah Code Ann. §76-3-207(2)(e)(Supp. 1988); Va.Code Ann. §19.2-264.4(B)(v)(Repl. 1983); Wash.Rev.Code §10.95.070(7)(Cu.Supp. 1988); Wyo.Stat. §6-2-102(j)(vii)(1988).

CONCLUSION

WHEREFORE, the opinions below should be affirmed.

Respectfully submitted,

FREDERIC J. COWAN
KENTUCKY ATTORNEY GENERAL

ELIZABETH ANN MYERSCOUGH
ASSISTANT ATTORNEY GENERAL

*DAVID A. SMITH
ASSISTANT ATTORNEY GENERAL
STATE CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600

COUNSEL FOR AMICI CURIAE

*Counsel of Record